(29,650)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 344.

JOHN V. CAMPBELL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, TRANSFERRED FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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United States Circuit Court of Appeals

FOR THE SIXTH CIRCUIT

RECORD

JOHN V. CAMPBELL,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

PETITION—Filed March 4, 1922.

Plaintiff resides in the Southern District of Ohio, Western Division, and in Anderson Township, Hamilton County, Ohio, and, at the time hereinafter mentioned, was and still is the legal owner in fee simple of the following described real estate:

Situate in Anderson Township, Hamilton County, Ohio, and being a part of Survey No. 706 of said Township and being more particularly described as follows:

Beginning at the intersection of the center lines of Mt. Carmel and Broadwell Roads; thence in the center of Broadwell Road North 59 degrees 40 minutes West 415.32 feet; thence south 27 degrees 43 minutes west 210 feet; thence south 59 degrees 40 minutes east 316.57 feet; thence north 55 degrees 35 minutes east 210.90 feet to the center line of Mt. Carmel Road; thence in said center line north 27 degrees 43 minutes east 19 feet to the place of beginning containing 1.81 acres.

In order to conduct the war between the United States of America and the Imperial German Government and the United States of America and the Imperial Royal Austro-Hungarian Government it was necessary for defendant to construct extensive ammunition factories for the manufacture of nitrates without the delays incident

to a search of the title and negotiation with the owners for the purchase of lands necessary, and said 1.81 acres of plaintiff's land together with approximately 520 adjoining acres of land were selected and occupied by the defendant in the period of actual hostilities in said war for the erection of a plant for the manufacture of nitrates to be used as an ingredient of high explosives, the production of which was necessary to a successful prosecution of said war. Defendant, by its agents and employees, took possession of plaintiff's said 1.81 acres of land on or about the 31st day of August, 1918, without having appropriated same by law and without having compensated plaintiff therefor in money or otherwise. After said taking of plaintiff's said 1.81 acres of land defendant expended about six million ($6,000,000) Dollars under appropriations made by law in the construction thereon and upon approximately five hundred and twenty adjoining acres of land of a nitrate plant with the necessary appurtenances known as United States Government Nitrate Plant No. 4 Ancor, Ohio. Plaintiff's said 1.81 acres of land were enclosed by defendant with a fence, the top soil was removed therefrom to adjoining land, and railway tracks were installed and ballasted by defendant on said 1.81 acres of land and a permanent plant road was built across the edge thereof and said 1.81 acres of land were used for coal and locomotive storage purposes.

Before said taking the plaintiff used said 1.81 acres of land for garden purposes but the use which defendant has made of said land has entirely destroyed its value and made impossible its use for gardening purposes.

Since said taking defendant has been and still is in possession of said 1.81 acres of land without any agreement therefor with plaintiff and has wholly refused to compensate plaintiff therefor in any manner and has no right, legal or equitable, to said land.

Plaintiff further says that he is, and at the time of said taking of his said 1.81 acres of land was, the owner in fee simple of the following described real estate:

Situate in Anderson Township, Hamilton County, Ohio, and being a part of the Broadwell Estate and designated as Survey 706 of said Township above named, bounded as follows:

Beginning at a large nigger head at the southeast corner of the Broadwell estate; thence in the southerly

line of the said Broadwell estate north 63 degrees 03 minutes west 270 feet to a point at the northeast corner of the 34 acre and 44 pole tract conveyed by Artemus Day and wife to Cyrus Broadwell by deed dated August 3, 1867, recorded in Deed Book 346, page 114, Hamilton County Recorder's Office; thence in the southerly line of the said 34 acre and 44 pole tract 300 feet to a point in the center of the road leading to Mt. Carmel; thence in the center of said road north 36 degrees 58 minutes west 278.56 feet to a stake; thence north 48 degrees 47 minutes west 410.95 feet to a stake; thence north 1 degree 12 minutes west 410.62 feet to a stake; thence north 58 degrees 04 minutes east 150.41 feet to a stake; thence north 8 degrees 25 minutes west 137.72 feet to a stake; thence north 2 degrees 42 minutes west 302.80 feet to a stake; thence north 13 degrees 36 minutes west 342.35 feet to a stake; thence north 30 degrees 49 minutes west 152.95 feet to a stake; thence north 64 degrees 01 minutes west 190.95 feet to a stake; thence north 6 degrees 14 minutes west 241.20 feet to a stake; thence north 26 degrees 23 minutes east 53.08 feet to a stake; thence north 61 degrees west 415.32 feet to a stake thence north 26 degrees 23 minutes east 210 feet to a spike in the center of the County road; thence in the center of said road south 61 degrees east 415.32 feet to a stake at the intersection of the center lines of the two County roads; thence north 39 degrees 45 minutes east 198.00 feet to a stake at the intersection with the center line of the old road; thence in the center of the old road south 40 degrees 10 minutes east 223.08 feet to a stake; thence south 28 degrees 25 minutes east 330.00 feet to a stake; thence south 72 degrees 10 minutes east 174.90 feet to a stake; thence south 31 degrees 45 minutes east 124.08 feet to a stake; thence south 15 degrees 45 minutes east 284.46 feet to a stake; thence south 43 degrees 45 minutes east 124.74 feet to a stake; thence south 79 degrees 30 minutes east 566.28 feet to a stake; thence south 69 degrees 50 minutes east 721.38 feet to a stake; thence south 45 degrees 36 minutes east 440 feet to a stake in the easterly line of the Broadwell Estate; thence south 51 degrees 42 minutes west 1557.26 feet to the place of beginning, containing 69.37 acres of land as shown on plat of survey made by the County Surveyor of Hamilton County and recorded in Plat Book 27, Page 44, Hamilton County Surveyor's Records—

of which said 1.81 acres is a part. Plaintiff is, and at the time of said taking of his said 1.81 acres of land

was, in the actual occupancy of his said 69.37 acres of land and said 69.37 acres of land are, and have been for many years, under a high state of improvement, and occupied by plaintiff for his residence, and used for purposes of cultivation, and said land had special value as country residence property because of its commanding view of the beautiful Little Miami River Valley, its proximity to the City of Cincinnati and its approach thereto over highly improved public roads.

The taking of said 1.81 acres of plaintiff's land and other land adjoining and in the vicinity for the uses and purposes of the United States of America as hereinabove set out has damaged the residue of plaintiff's said 69.37 acres of land.

Plaintiff now offers to convey said 1.81 acres of land in fee simple to defendant upon payment by the defendant of just compensation for the value of same and the damage to the residue of plaintiff's said lands, and agrees that upon the fixing of just compensation in this case and the payment of the same a decree of this court may be entered ordering a conveyance in fee simple of said 1.81 acres of land to the defendant, and plaintiff here tenders said conveyance and surrender of title of said 1.81 acres of land upon payment as aforesaid.

Plaintiff further says that just compensation for the value of said 1.81 acres of land taken and the damage to the residue of plaintiff's said lands is the sum of Ten thousand ($10,000) Dollars.

Wherefore plaintiff prays that defendant may be decreed to pay plaintiff just compensation for the value of said 1.81 acres of land so unlawfully taken and appropriated by defendant as aforesaid and for the damage to residue of plaintiff's land as aforesaid, and that he recover judgment against defendant for the sum of Ten thousand ($10,000) Dollars and costs, and that a copy of this petition filed herein may be served upon the District Attorney of the United States of America in and for the said Southern District of Ohio, Western Division, and for such other and further relief as is proper.

John V. Campbell and Ed. D. Schorr,
Attorneys for Plaintiff.

(Duly verified.)

MOTION TO STRIKE OUT—Filed April 13, 1922.

Now comes the defendant by the United States Attorney for the Southern District of Ohio and moves to strike from the petition of the plaintiff that part of said petition beginning at line 24, page 2, of said petition and ending at line 37 inclusive of page 3, of said petition, for the reason that said allegations are irrelevant and immaterial as a matter of law.

Thos. H. Morrow,
Acting United States Attorney.

DEMURRER—Filed April 13, 1922.

Now comes the defendant, The United States of America, by the District Attorney for the Southern District of Ohio, Western Division, and demurs to the petition filed in the above entitled cause for the reason that the plaintiff has no capacity to sue.

Thos. H. Morrow,
United States Attorney.

OPINION—Filed April 29, 1922.

Peck, District Judge:

Action for the value of land taken by the United States during the recent war, for the site of a nitrate plant, without compensation or condemnation proceedings, and for damages to the residue of the tract from which said land was severed. Demurrer to the petition and motion to strike out allegations of damage to the residue.

Power on the part of the President to acquire, and an appropriation of money to pay for such lands for the purpose aforesaid is found in the Act of June 3, 1916 (39 Stat. 215, Section 124; U. S. Comp. Stat., Section 3110-b), and power of the Secretary of War to condemn, in the Act of July 2, 1917 (40 Stat., 241), amended April 11, 1918 (U. S. Comp. Stat., Section 6911-a).

The petition avers that the land was a garden; that the Government "by its agents and employees" entered, removed the top soil, installed railroad tracks and ballast, enclosing the land with a fence, and is still in possession; that the work done was part of the construction of a munition plant for the manufacture of nitrates, upon which six million dollars was expended. These averments show a dispossession of the owner, a destruction of the agricultural character of the land, and an acquisition by the Government so complete as to amount to a taking, if by one authorized so to do, of the fee for the purposes indicated. From such a taking, when made by one properly exercising statutory authority, arises an implied obligation upon the part of the United States to pay just compensation. *United States* v. *Great Falls Mfg. Co.*, 112 U. S., 645; *United States* v. *Cress*, 243 U. S., 316; *United States* v. *Lynah*, 188 U. S., 445. Such compensation, to be adequate, must include the damage, if any, to the residue of the tract accruing by reason of the severance of the part taken and the devoting of the same to the purposes of the Government. *United States* v. *Grizzard*, 219 U. S., 181. Such an action is within the jurisdiction of the District Court, under Section 24 (20) of the Judicial Code.

The proviso of the Act of March 2, 1919 (40 Stat., 1272), that such Act shall not authorize payment to be made of any claim not presented before June 30, 1919, is not a limitation upon suits brought by favor of the aforesaid section of the Judicial Code, but only a limitation

upon the authority of the Secretary of War to setttle upon a *quantum meruit* basis claims founded upon informal war contracts, that is to say, contracts executed in the emergency without pursuing the formalities required by law. By its very language the proviso purports to be nothing more than a limitation of the authority conferred by the Act itself. *Benedict* v. *United States*, 271 Fed., 714.

There is, however, no averment of the authority by which the agents and employees of the defendant entered and dispossessed plaintiff. "But although Congress may have conferred upon the Executive Department power to take land for a given purpose, the Government will not be deemed to have so appropriated private property, merely because some officer thereafter takes possession of it with a view to effectuating the general purpose of Congress. See *Ball Engineering Co.* v. *J. G. White & Co.*, 250 U. S., 46, 54-57. In order that the Government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power." *United States* v. *North American Co.*, 253 U. S., 330, 333.

As the allegation in the petition is general that the United States, by its agents and employees, took possession of plaintiff's land, without more, it is concluded that the case is within the language above quoted, and the demurrer must be sustained. Leave to amend within fourteen days.

J. W. Peck,
Judge.

For Plaintiff, John V. Campbell, Ed. D. Schorr.

For the Government, Thomas H. Morrow, United States Attorney.

Entry Overruling Motion to Strike Out and Sustaining Demurrer.

Amended Answer.

ENTRY OVERRULING MOTION TO STRIKE OUT AND SUSTAINING DEMURRER—Filed May 3, 1922.

This cause came on for hearing upon motion of defendant to strike from the petition the allegations beginning with the words "Plaintiff further says" at the twenty-fourth line of page two of said petition and ending with the words "said 69.37 acres of land" on the thirty-seventh line of page three of said petition, and upon demurrer by defendant to said petition;

And upon consideration the court find that said motion to strike out is not well taken and same is overruled, to all of which the defendant excepts.

The court further find that said demurrer is well taken for the reason that the petition does not allege the authority by which the agents and employees of the defendant entered and dispossessed plaintiff and the demurrer is therefore sustained, to all of which the plaintiff excepts.

And upon his application plaintiff is granted leave to amend the petition filed herein by interlining at the first line on page two thereof after the words "agents and employees" the words "acting under the direction and authority of the Secretary of War."

Peck, J.

AMENDED ANSWER—Filed September 26, 1922.

Now comes the United States of America, defendant in the above entitled cause, by Thomas H. Morrow, United States Attorney in and for the Southern District

of Ohio, Western Division, and for answer to the plaintiff's petition admits that the plaintiff was and still is the legal owner in fee simple of the property firstly described in said petition.

Defendant further admits that the said property so firstly described, together with approximately 520 adjoining acres of land was occupied by agents of the defendant in the period of hostilities for the purposes and in the manner alleged in the said petition and that defendant, by its agents and employes acting under direction and authority of the Secretary of War, took possession of said property on or about the 31st day of August, 1918, without having appropriated the same by law and without having compensated plaintiff therefor but defendant denies that such taking was forcible or that it was a taking of the fee simple title and on the contrary, alleges that such taking was of the temporary use and occupancy thereof only.

Defendant further admits that after said taking, it spent about $6,000,000 under legal appropriation in the construction upon said tract and said other 520 acres of a nitrate plant known as "United States Government Nitrate Plant, No. 4, Ancor, Ohio."

Defendant further admits that said tract firstly described of plaintiff, consisting of 1.81 acres of land was enclosed by defendant with a fence. It admits that the top soil was removed therefrom, that railway tracks were installed and ballasted by defendant on said tract, that a permanent plant road was built across the edge thereof, and that said 1.81 acres of land were used for coal and locomotive storage purposes.

Defendant admits that prior to said taking of said tract by defendant that plaintiff used the same for garden purposes but denies that the use which defendant has made of said land has entirely destroyed its value.

Defendant denies that it is still in possession of said tract of land under authority above set forth or any other authority, but defendant admits it has not compensated plaintiff therefor in any manner.

Defendant further admits that at the time of the taking of said tract firstly described that plaintiff was owner in fee simple of the tract of land secondly described in the petition and that said tract of 1.81 acres firstly described, was a part of said tract secondly described in said petition.

Amended Answer.

Defendant further admits that now and at the time of said taking of said tract firstly described that plaintiff was in actual occupancy of said tract secondly described, and admits that said tract is and has been under a high state of improvement, was and is, occupied by plaintiff as a residence and in part used for purposes of cultivation. Defendant denies, however, that said land has special value as country residence property for the reason stated in said petition or for any other reason.

Defendant further denies that the taking of said 1.81 acres of land firstly described in the petition and other land adjoining and in the vicinity for the United States and purposes of the United States of America as set forth in the petition has in any manner or form damaged the residue of plaintiff's said 69.37 acres of land, and states further that the United States of America has abandoned the construction of a nitrate plant on said 520 acres mentioned in said petition, has removed a great part of said construction and has heretofore, pursuant to authority granted by Congress to that end, sold 220 acres, more or less, of the said other 520 acres as above set forth, and now retains only a portion of the said other 520 acres with certain buildings thereon which have been used for warehouse purposes and none other.

Defendant admits that there is owing to the plaintiff a just compensation for the use and occupancy of said 1.81 acres of land from the time of the taking thereof until the 22d day of September, 1922, and the defendant therefore asks the court that the said just compensation for the use and occupancy of the said 1.81 acres of land be fixed by this Honorable Court but defendant denies that any and all compensation for any other purpose than for such use and occupancy of the said 1.81 acres of land or for the fee simple title thereto is owing by the defendant to the plaintiff, and further denies that the sum of $10,000 or any like sum is owing by this defendant to plaintiff.

Wherefore, having fully answered, defendant asks that upon the fixing of said just compensation for the use and occupancy of said 1.81 acres of land first described in the said petition, that defendant be dismissed hence with its costs herein expended.

Thos. H. Morrow,
Attorney for Defendant.

(Duly verified.)

OPINION—Filed November 22, 1922.

Peck, District Judge:

Action for value of land taken by the United States during the recent war for part of the site of a nitrate plant, without compensation or condemnation proceedings, and for damages to the residue of the tract from which the land was severed.

Prior to the 31st of August, 1918, the Government had determined to build a nitrate plant at Ancor, in the Little Miami valley, near the city of Cincinnati, and had acquired possession of a large tract comprising many parcels of land, and was proceeding with the construction of the works. Upon that day the officer in charge, acting under authority of the Secretary of War, entered and took possession of 1.81 acres of land belonging to the plaintiff, lying in the valley at the foot of the hill upon which his residence is situated. The lot so taken had been used by plaintiff as a garden, was in a high state of cultivation, and, although separated from the remainder of his lands by a county road, was nevertheless a part and parcel of his entire estate, which comprised 69.73 acres. The Government took the top soil from this lot for the purpose of filling a depression in adjacent property, and built a coal tipple, numerous railroad tracks, and a substantial road upon it, entirely and permanently destroying its value for agricultural purposes. It proceeded with the construction of the nitrate works, erecting buildings, roads, railroads, a sewerage system, and such other things as are usual incidental to a large industrial development. The entire tract comprised 1,300 acres. After the armistice the Government determined to abandon the project and to dispose of the properties acquired. A part of the lands were returned to their former owners, with compensation for use and damage; a part were sold, and the remainder, 320 acres, the Government still holds but has definitely determined to sell. Although numerous conferences looking to an adjustment were had with plaintiff, no settlement was ever effected, and in June, 1921, an order was made to restore his property to him. Recently, and during the pendency of this suit, the Government has taken its fence from about this 1.81 acre lot and has removed the railroad tracks and now disclaims title. The Government here urges that plaintiff is in a position to resume pos-

session of the land and that it is willing to pay for the temporary use and occupancy thereof and for damage to the land itself, but not for the fee nor for damages to the residue of the estate. Mr. Campbell has never consented to take the land back. The parties are in substantial agreement that the value of the lot is about $750, and that it has been damaged to the full extent of its value. The extent of the damage to the residue of the estate is in dispute.

(1) The seizure made by an army officer under the orders of the Secretary of War, who must be assumed to have spoken for the President, the latter having been authorized by Congress to acquire lands for the purposes of a nitrate plant, was by sufficient authority to render the Government liable to pay for the same as upon implied contract, although no condemnation proceedings had been filed. It is the authority to take, and not the manner of taking, that determines the liability of the Government in this respect. *United States* v. *Lynah*, 188 U. S. at page 467; *United States* v. *Great Falls Mfg. Co.*, 112 U. S., 645; *United States* v. *Kress*, 242 U. S., 316; *United States* v. *North American Co.*, 253 U. S., 330.

(2) The Government's seizure and use having been such as amounts to a taking, as set forth in the former opinion of this court on demurrer, its title vested, and the right of the owner to compensation having become fixed, could not thereafter be undone without his consent. Therefore, the present abandonment of the land is ineffectual to cancel the Government's obligation to pay for the same.

(3) The plaintiff claims in addition to the value of the land taken, damages by reason of its severance and because of the uses made of it during the period of government activities, and those to which the government may hereafter put it, including that of placing it on the market to be sold to whomsoever may buy, for any purpose whatsoever. These elements are thought proper to be considered, and so far as the value of the residue is found thereby to be reduced, they are allowed.

(4) But the plaintiff also claims that the award should include damages to the residue of his estate by reason of the government's uses, past, present and future, of the various different tracts of land which it acquired, by purchase or condemnation, from persons other than himself, for the now abandoned nitrates project.

During the period of activities, the use and enjoyment of the residue of the plaintiff's estate was impaired by the construction and operation on the lot taken of some five railroad spurs, a coal tipple, and an industrial roadway. This impairment was no doubt enhanced by the work which was proceeding upon the other properties.

The present use of the other lands is not claimed to be injurious to the plaintiff's estate except by reason of the fact that the view, which is a considerable element if its value, is less beautiful than it would have been had the agricultural surroundings continued unchanged. The marring of the prospect is due principally to the presence of certain buildings and foundations of others that have been removed. These structures are, however, at quite a distance from the plaintiff's residence, and are not an obstruction to the view but only objects in the picture less pleasant than those which were formerly there. The buildings are used as government warehouses. They stand, of course, on property which plaintiff did not own, and are now used for storage purposes, quite independently of the lot taken from him.

As to the injury to the residue of plaintiff's estate by the future uses of the tract acquired from other persons, the case offered is that this tract, improved as it has been by the government, by roads, railways, sewers, fences, water and lighting facilities, is soon to be offered for sale, and will probably be bought and used for industrial purposes; and that this probability has, even at the present time, a very depressing effect upon the value of plaintiff's estate, considered from the standpoint of its best use, that of a fine country residence. This is one of the chief elements in plaintiff's claim. While it is doubtful if this element is not too speculative and remote to be considered (*Sharp* v. *United States*, 112 Fed., 893, affirmed 191 U. S., 341), that point need not be decided, as it is found to be clearly inadmissible on other grounds.

The weight of authority, the general principles of the law of compensation for injuries done, and what seems to be the better reasoning, sustain the proposition that damages to the residue, to be allowable, must be such as flow from the use made of the land which is taken, and not from what is done by the condemnor upon other lands. And this appears to be certainly so unless the two are so blended into one entirety that separation becomes impossible. *Horton* v. *Colwyn Bay Council*, 1 L. R., K. B.

(1908) 327; *Walker* v. *Old Colony R. R.*, 103 Mass., 10; *Adams* v. *C. B. & N. R. R. Co.*, 39 Minn., 286; *Demueles* v. St. P. & N. P. Ry. Co., 44 Minn., 436; Keller v. Miller, 63 Colo., 304; 2 Lewis on Eminent Domain, Third Ed., Sections 750, 822; 20 C. J., 735; 10 R. C. L., 154.

Cases to the contrary, *C. K. & N. Ry. Co.* v. *Van Cleave*, 52 Kans., 665, and *Blesch* v. *Railway Co.*, 48 Wis., 168, having to do with railway appropriations, are apparently predicated upon the consideration that the railway is an entirety and that the damage from its presence on the land taken is inseparable, in fact, from that which results from its operation on the remainder of its right of way. But in Richards v. Washington Terminal Railway Co., 233 U. S., 546, where the Supreme Court held that the plaintiff was entitled to damages for injuries from great quantities of smoke and gas emitted from a tunnel opening near his premises in Washington, but not for that given off by the locomotives on tracks adjacent his land, it was left to the trial court, to which the case was remanded, to distinguish between these two elements of damage. Thus, the line of demarcation between remediable injury and *damnun absque injuria* was preserved despite the practical difficulties of separation, in a case not unlike this one. Furthermore, in the present case it can not be foretold whether the lands now held by the government will be bought by one or several purchasers or will be put to one or several uses, or whether the other lands will be used in conjunction with the lot which has been taken from the plaintiff or not. Therefore, it can not be said that the probable future injuries will arise from a single and inseparable use of plaintiff's lot and the other lands.

This does not seem to be a case of local law, in which the decisions of the courts of Ohio are controlling; but, were it so, nothing in those cases decided by the Supreme Court of the State touching the subject of damage to the residue is to the contrary. *C. & P. R. R.* v. *Ball*, 5 Ohio St., 568, 575; *Grant* v. *Hyde Park*, 67 Ohio St., 166. On the other hand, the Supreme Court of Ohio has, in a case similar to the present, separated the remediable consequences of a taking from those which, although resulting from the same taking, merely amount to *damnum absque injuria*. In *Hatch* v. *C. & I. R. R. Co.*, 18 Ohio St., 92, the lands of plaintiff were subject to the easement of a canal maintained by a corporation. He was thus afforded a place to

water stock and a means of navigation, both of which were convenient, and while they lasted added value, no doubt, to his farm. The canal was taken by a railroad, and for the added burden to his land Hatch was held to be entitled to compensation. But the Supreme Court decided that the loss of the water privileges previously enjoyed, and for which he claimed three thousand dollars, was not a matter to be considered in the making of the award, because the water rights had not been his. So, in the instant case, the beautiful view and pleasant environments which may be lost to plaintiff by the establishment of an industrial colony are not his property, although doubtless they lend value to his estate.

The statute of Ohio requires the jury to be sworn to ascertain, besides the value of the land taken, how much less valuable the remaining portion of property will be "in consequence of such appropriation." General Code of Ohio, Section 11503. It is to be noted that it is not the consequence of all of the appropriator's operations in the neighborhood which is to form the basis of the verdict for damages, but only the result of the appropriation. It is well established that those elements of damage suffered by the land-owner in common with the community at large, as distinguished from those which fall upon him individually, are not to be included in the award. *Hatch* v. *Railroad* (*supra*.) And it must be borne in mind that this is not an action of nuisance. Had none of plaintiff's land been taken, works on the other lands, less than nuisance, would not have given rise to any action at all. It is, of course, the general principle that damages, to be recoverable, must be such as are the consequences of the injury to be redressed. This rule would seem to set the limit to the full measure of compensation to which plaintiff is entitled.

It is therefore concluded that the activities of the government on lands other than the lot taken can not be considered in determining the award to the plaintiff.

The assessment will be as follows: The value of the lot taken, which the parties have agreed is $750; damages to the residue of the estate resulting from the appropriation of this lot by reason of its severance, by reason of its loss as the convenient garden spot of the estate, by reason of the uses to which it has been put, particularly during the period of construction (remembering, however,

that the agricultural use of the residue of plaintiff's estate during that period was unimpaired, and also that it then had at least some utility as a residence), and by reason of the uses to which the lot appropriated may in the future be put the sum of $2,250. Therefore, the judgment will be for plaintiff in the sum of $3,000.

J. W. Peck, Judge.

For Plaintiff: Ed. D. Schorr, Cincinnati, Ohio.

For Government: Thomas H. Morrow, United States Attorney.

ADDENDA TO OPINION—Fled November 22, 1922

Peck, District Judge:

Plaintiff requests a finding of the amount of damages disallowed by reason of impairment of the present market value of the residue of his estate in consequence of the government's existing improvements upon the lands acquired from other persons and in consequence of the probability that such lands will be in the future put to industrial uses. In compliance with this request the finding is made.. It is that the amount of such damage so arising and disallowed is the sum of $5,000.

J. W. Peck, Judge.

For Plaintiff: Ed. D. Schorr, Cincinnati, Ohio.

For Government: Thomas H. Morrow, United States Attorney.

Judgment.

JUDGMENT—Filed March 13, 1923.

This cause coming on for hearing was submitted to the court upon the pleadings and the evidence, and on consideration thereof,

The court finds that prior to August 31, 1918, defendant, The United States of America, had determined to build a nitrate plant at Ancor, in the Little Miami Valley, near the City of Cincinnati, and had acquired possession of a large tract comprising many parcels of land and was proceeding with construction of the works. Upon that day, agents of the defendant, acting under the authority of the Secretary of War, without compensation or condemnation proceedings, and without paintiff's consent, entered and took possession of 1.81 acres of land belonging to plaintiff, John V. Campbell, lying in a valley at the foot of the hill, upon which plaintiff's residence is situated. The lot so taken had been used by plaintiff as a garden and was in a high state of cultivation and was a part and parcel of his entire estate which comprised 69 .73 acres. Defendant proceeded with the construction of the nitrate works, erecting buildings, roads, railroads, sewerage system and such other things as are usually incidental to a large industrial development, and took the top soil from said 1.81 acres of land for the purpose of filling a depression in adjacent property, enclosed same and other adjoining land in said tract which were to be used for factory purposes, with a fence, built thereon and on adjoining lands a coal tipple, numerous railroad tracks and a substantial road, entirely and permanently destroying the value of same for agricultural purposes. The entire tract comprised 1300 acres.

After the armistice defendant determined to abandon the project and to dispose of the properties acquired. Part of the lands were returned to their former owners with compensation for use and damage; part were sold; and the remainder, 320 acres including said 1.81 acres, defendant still holds, but has definitely determined to sell.

During the period of activities the use and enjoyment of the residue of plaintiff's estate was impaired by the construction and operation on the said 1.81 acres of some five railroad tracks and spurs, a coal tipple and a permanent industrial roadway. This impairment was enhanced also by the work which was proceeding upon the other properties.

The present use of the other lands is not injurious to

the plaintiff's estate, except by reason of the fact that the view which is a considerable element of its value is less beautiful than it would have been had the agricultural surroundings continued unchanged. The marring of the prospect is due principally to the presence of certain buildings and foundations of others that have been removed. These structures are, however, at quite a distance from plaintiff's residence and are not an obstruction to the view but only objects in the picture less pleasant than those which were formerly there. The buildings are used as government warehouses and stand on property which plaintiff did not own and are now used for storage quite independently of the land taken from plaintiff.

The court finds that defendant's seizure and use of said 1.81 acres of land amounts to a taking of the fee thereof and that the reasonable value of the said fee is $750 and that therefore plaintiff is entitled to recover from defendant the sum of $750.

The court further finds that the damages to the residue of plaintiff's estate resulting from the appropriation of said 1.81 acres, by reason of their severance, by reason of their loss as the convenient garden spot of the estate, by reason of the usec to which they have been put, particularly during the period of construction (remembering, however, that the agricultural use of the residue of plaintiff's estate during that period was unimpaired, and also that it then had at least some utility as a residence), and by reason of the uses to which said 1.81 acres may, in the future, be put, is the sum of $2,250, and that plaintiff is entitled to recover from defendant therefore the sum of $2,250.

The court further finds that the amount of plaintiff's damages by reason of injury to the residue of his estate, by reason of the uses, present and future of the various different tracts of land which defendant acquired by purchase or condemnation from persons other than plaintiff for the now abandoned nitrates project, and chiefly by reason of the probability that said tract improved as it has been by defendant by roads, railroads, sewers, fences, water and lighting facilities, is soon to be offered for sale, and will probably be bought and used for industrial purposes and that this probability has even at the present time a very depressing effect upon the value of plaintiff's

estate considered from the standpoint of its best use, that of a fine country residence, is the sum of $5,000, but the court finds that plaintiff is not entitled to recover said sum and said sum is therefore disallowed.

The court therefore finds that the defendant, the United States of America, is indebted to the plaintiff, John V. Campbell, in the sum of $3,000 with interest at the rate of 4 per cent per anum from the 13th day of March, 1922 and for his costs.

And the plaintiff, having filed a motion to set aside the decision and for a new trial, and the court being fully advised, overrules the same and hereby enters said above judgment.

And the court further finds that upon the payment to the plaintiff, John V. Campbell, of said sum of $3,000 with interest thereon at the rate of 4 per cent per annum from the 13th day of March, 1922, by the United States of America, or upon deposit in the register of this court of said amount for said purposes and if said payment has been made within the time specified by law, all right, title and interest in and to the lands and premises hereinafter described, shall be divested from said plaintiff, John V. Campbell, and from all persons claiming by or under him, and shall vest in the United States of America. The property appropriated which shall so vest in the United States of America is described as follows:

"Situated in Anderson Township, Hamilton County, Ohio, and being a part of Survey No. 706 of said Township and being more particularly described as follows:

Beginning at the intersection of the center lines of Mt. Carmel and Broadwell Roads; thence in the center of Broadwell Road North 59° 40′ West 415.32 feet; thence South 27° 43′ West 210 feet; thence South 59° 40′ East 316.57 feet; thence North 55° 35′ east 210.90 feet to the center line of Mt. Carmel Road; thence in said center line North 27° 43′ East 19 feet to the place of beginning, containing 1.81 acres."

The court finds further that this action was properly brought and that the United States of America can acquire a good title to said property by the payment mentioned aforesaid; that all parties of interest have been properly served or have entered their appearance herein and that all proper steps have been taken herein.

To all of which the plaintiff, by his attorneys, excepts.

J. W. Peck,
Judge, U. S. Disrtict Court, S. D. O.

Have seen and approved.

John V. Campbell,
Ed. D. Schorr, for plaintiff.

Thos. H. Morrow, U. S. Attorney.

PETITION FOR WRIT OF ERROR—Filed Mar. 21, 1923

To the Honorable John W. Peck, District Judge:

The above named plaintiff, John V. Campbell, feeling himself aggrieved by the judgment rendered and entered in the above entitled cause on the 13th day of March, 1923, does hereby seek to review said judgment at law by writ of error to the Circuit Court of Appeals of the United States for the Sixth Circuit, for the reasons set forth in the assignment of errors filed herewith, and he prays that a writ of error be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Sixth Circuit, under the rules of such court in such cases made and provided, and that an order be made fixing the amount of security which plaintiff shall give and furnish upon said writ of error.

John V. Campbell,
Ed. D. Schorr,
Attorneys for Plaintiff.

ASSIGNMENT OF ERRORS—Filed March 21, 1923.

Now comes the plaintiff in the above entitled cause and files the following assignment of errors upon which he will rely in the prosecution of the proceeding in error in the above entitled cause from the judgment entered by this Honorable Court on the 13th day of March, 1923.

1. The court erred in refusing to allow plaintiff to recover from defendant the sum of $5,000 which the court found to be the amount of plaintiff's damages by reason of injury to the residue of plaintiff's estate by reason of the uses, present and future, of the various different tracts of land which defendant acquired by purchase or condemnation from persons other than plaintiff for the now abandoned nitrates project, and by reason of the probability that said tract, improved as it has been by defendant, by roads, railroads, sewers, fences, water and lighting facilities, is soon to be offered for sale and will probably be bought and used for industrial purposes and that this probability has, even at the present time, a very depressing effect upon the value of plaintiff's estate considered from the standpoint of its best use. that of a fine country residence.

Wherefore, plaintiff, plaintiff in error, prays that said judgment entered on the 13th day of March, 1923, may be modified and that said United States District Court for the Southern District of Ohio, Western Division, be ordered to modify said judgment so as to allow plaintiff to recover from defendant the said sum of $5,000.

John V. Campbell,
Ed. D. Schorr,
Attorneys for Plaintiff.

ORDER ALLOWING WRIT OF ERROR—Filed March 21, 1923.

This day came John V. Campbell, plaintiff in the above entitled action, and presented his petition for the allowance of a writ of error and an assignment of errors accompanying the same, and, upon consideration, the court hereby allows a writ of error to have reviewed in the United States Circuit Court of Appeals for the Sixth Circuit the judgment heretofore entered herein, and fixes the amount of bond to be given by the said John V. Campbell on said writ of error in the sum of $250.

J. W. Peck,
Judge, U. S. District Court, S. D. O.

WRIT OF ERROR— Filed March 21, 1923.

United States of America, Sixth Judicial Circuit, ss.
The President of the United States,

To the Honorable, the Judge of the District Court of of the United States, for the Southern District of Ohio, Western Division,
Greeting:

Because in the record and proceedings, as also in the rendition of the judgement of a plea which is in the said District Court, before you, or some of you, between John V. Campbell, plaintiff, and The United States of America, defendant, a manifest error hath happened, to the great damage of the said John V. Campbell, plaintiff, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy jusice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under

your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, the 21st day of March, in the year of our Lord one thousand nine hundred and twenty-three, and of the Independence of the United States of America the one hundred and forty-seventh.

(Seal) B. E. Dilley,
Clerk of the District Court of the United States,
Southern District of Ohio.
By Harry F. Rabe,
Deputy

Allowed by J. W. Peck.
(Seal) U. S. District Judge, S. D. O.

BOND ON WRIT OF ERROR—Filed March 21, 1923.

Known all Men by these Presents, That we, John V. Campbell, as principal and Fidility and Deposit Company of Maryland of Baltimore, Maryland, as sureties, are held and firmly bound unto the defendant, The United States of America in the full and just sum of Two hundred and fifty Dollars, to be paid to the said defendant, The United States of America, its certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and ad-

ministrators, jointly and severally, by these presents. Sealed with our seals and dated this 21st day of March, in the year of our Lord one thousand nine hundred and twenty-three (1923).

WHEREAS, lately at a regular term of the District Court of the Unied States for the Southern District of Ohio, Western Division, in a suit depending in said Court, between John V. Campbell, plaintiff, and the United States of America, defendant, a judgment was rendered against the said John V. Campbell and the said John V. Campbell having obtained a writ of error and filed a copy in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The United States of America, defendant, citing and admonishing said defendant to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said circuit, on the 20th day of April next.

Now, the condition of the above obligation is such, That if the said John V. Campbell shall prosecute said writ of error to effect, and answer all damages and cost if he fail to make said plea good. then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

John V. Campbell (Seal.)
Fidility and Deposit Company of Maryland, (Seal.)
By Paul M. Millikin. (Seal.)

Approved by J. W. Peck
(Seal) U. S. District Judge, S. D. O., Western Division.

CITATION—Filed March 24, 1923.

United States of America, Sixth Judicial Circuit, ss.

To The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals

for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, within 30 days from the date hereof, pursuant to a Writ of Error, filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, wherein John V. Campbell is plaintiff, and now plaintiff in error, and you are defendant, and now defendant in error, to show cause, if any there be, why the judgment rendered as is in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this 21st day of March, in the year of our Lord one thousand nine hundred and twenty-three, and of the Independence of the United States of America the one hundred and forty-seventh.

J. W. Peck, U. S. District Judge, S. D. O. W. D.

State of Ohio, County of Hamilton, ss.

On this 24th day of March, A. D. 1923, personally appeared before me, a Notary Public in and for said County, John V. Campbell and made oath that he delivered a copy of within citation personally to Thomas H. Morrow, District Attorney of the United States in and for the Southern District of Ohio, Western Division, on March 24th 1923.

John V. Campbell.

Sworn to and subscribed before me this 24th day of March, 1923, Ed D. Schorr, Notary Public in and for Hamilton County, Ohio.

State of Ohio, Hamilton County, ss.

On this 24th day of March, A. D. 1923, personally appeared before me, a Notary Public in and for said County, John V. Campbell and made oath that he, on said date, mailed a copy of the within citation to the Attorney General of the United States of America by registered letter, a true copy of which is as follows:

March 24th, 1923

The Honorable Attorney General
of The United States of America,
Washington, D. C.

Dear Sir,

Enclosed please find a copy of citation and notice of the allowance of a writ of error in the case of John V. Campbell vs The United States of America, No 3111, U.

S. District Court, Southern District of Ohio, Western Division.

Please acknowledge receipt.

Very truly yours,

(Signed) John V. Campbell and
Ed. D. Schorr

John V. Campbell

Sworn to before me and subscribed in my presence this 24th day of March, 1923..

Ed. D. Schorr, Notary Public, Hamilton County, Ohio.

Service of the within citation on The United States of America is hereby acknowledged this 24th day of March, 1923

Thos. H. Morrow, United States District Attorney.
In and for the Southern District of Ohio.

STIPULATION AS TO TRANSCRIPT OF RECORD—
Filed March 27, 1923.

It is hereby stipulated by and between John V. Campbell, plaintiff, by his attorneys, and The United States of America, defendant, by its attorney, the United States Attorney for the Southern District of Ohio, that the transcript of the record in the above entitled action in error to the United States Circuit Court of Appeals for the Sixth Circuit shall consist of the following:

(1) Petition of the plaintiff filed March 4, 1922.

(2) The motion to strike out and demurrer of the defendant filed April 13, 1922.

(3) The opinion of Judge Peck of April 29, 1922, overruling motion to strike out and sustaining demurrer.

(4) The entry of May 3, 1922, overruling motion to strike out and sustaining demurrer and granting plaintiff leave to amend by interlining.

(5) The answer of defendant filed September 26, 1922.

(6) The opinion of Judge Peck of November 22, 1922, on the decision of the case.
(7) The addenda to said opinion by Judge Peck dated November 29, 1922.
(8) The finding and judgement of the Court of March 13, 1923.
(9) The petition for a writ of error filed March 21, 1923.
(10) The assignment of errors filed March 21, 1923.
(11) Order of March 21, 1923 allowing writ of error.
(12) Bond filed March 21, 1923.
(13) Writ of error of March 21, 1923.
(14) Citation with return issued March 21, 1923.
(15) Stipulation as to transcript of record.

It is further stipulated that the printing of the captions, jurats, the affidavits of service, together with a copy of a letter notifying Attorney General of the United States of the filing of the suit may be dispensed with.

John V. Campbell & Ed. D. Schorr
Attorneys for John V. Campbell.
Thos. H. Morrow, United States Attorney for the
Southern District of Ohio.

CERTIFICATE OF CLERK.

United States District Court, Southern District of Ohio,
Western Division.

JOHN V. CAMPBELL,
No. 3111. vs.
THE UNITED STATES OF AMERICA,

I, B. E. Dilley, Clerk of the District Court of the United States for the District and Division aforesaid, do hereby certify that the foregoing pages numbered from 1 to 28 inclusive, contain a true and correct copy of the record

and proceedings indicated in the praecipe for record found on page 26 hereof, as the same appear and on file in the office of the Clerk of said court, in the above entitled cause.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of said Court, at the City of Cincinnati, Oho, this 20th day of April, 1923.

B. E. Dilley,
Clerk,
Harry F. Rabe,
Deputy.

(Seal.)

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 3920

JOHN V. CAMPBELL

vs.

UNITED STATES.

ORDER—Entered May 10, 1923

This cause is transferred to the Supreme Court pursuant to Section 238 (*a*) Judicial Code.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of transcript of record and order transferring cause to the Supreme Court in the case of John V. Campbell vs. United States of America, No. 3920, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 21st day of May, A. D. 1923.

Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit. [Seal of the United States Circuit Court of Appeals, Sixth Circuit.]

Endorsed on cover: File No. 29,650. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 344. John V. Campbell, plaintiff in error, vs. The United States of America. In error to the District Court of the United States for the Southern District of Ohio, transferred from the United States Circuit Court of Appeals for the Sixth Circuit. Filed May 28th, 1923. File No. 29,650.

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No. 344.

Supreme Court of the United States

(OCTOBER TERM, 1923)

JOHN V. CAMPBELL,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This cause was transferred to this court pursuant to Section 238(a) of the Judicial Code by the United States Circuit Court of Appeals for the Sixth Circuit to which court it was taken by a writ of error to the District Court of the United States for the Southern District of Ohio, Western Division.

John V. Campbell, plaintiff, filed a petition against the United States of America, defendant, in said District Court, alleging, in substance, that he was the owner of 69.37 acres of land at Ancor, in Hamilton County, Ohio; that the United States of America, while engaged in the late war, selected

a large tract of land at Ancor including 1.81 acres of plaintiff's said lands, for the site of a nitrate plant, and on August 31, 1918, without having appropriated same by law and without having compensated plaintiff therefor, took possession of said 1.81 acres of land and thereupon spent approximately $6,000,000.00 in constructing thereon and upon approximately 520 adjoining acres of lands, which it had acquired, a nitrate plant with the necessary appurtenances known as United States Government Nitrate Plant No. 4; that after so taking plaintiff's said 1.81 acres of land defendant enclosed same with a fence, removed the top soil therefrom to adjoining land, installed and ballasted railway tracks thereon, built a permanent plant road across the edge thereof and used said land for coal and locomotive storage purposes; that at the time of said taking plaintiff was in the actual occupancy of his said 69.37 acres of land and used same as his residence and for purposes of cultivation and that his property was especially valuable as a country residence; that the taking of said 1.81 acres and the use made thereof and of the adjoining lands as above set forth damaged the residue of plaintiff's said lands; that plaintiff was damaged by reason of said taking and by reason of damage to the residue of his lands in the sum of $10,000.00, for which he prayed judgment.

Defendant answered, admitting plaintiff's ownership and that said 1.81 acres of land, together with approximately 520 adjoining acres, were occupied by defendant for the purpose and in the manner

alleged in the petition and that after said taking about $6,000,000.00 was spent thereon, as alleged in the petition, and alleged that at the time of filing of said answer defendant had abandoned the construction of a nitrate plant on said 520 acres and had removed a great part of said construction and had sold 220 acres, more or less, of said 520 acres and had retained only a portion of said 520 acres with certain buildings thereon which were used for warehouse purposes.

Upon the issues made by the petition and answer the cause was tried to the court and the court found that prior to August 31, 1918 defendant had determined to build a nitrate plant at Ancor in the Little Miami Valley near the City of Cincinnati, and had acquired possession of a large tract comprising many parcels of land, and was proceeding with the construction of the works; that upon that day agents of the defendant, acting under the authority of the Secretary of War, without compensation or condemnation proceedings, and without plaintiff's consent, entered and took possession of plaintiff's said 1.81 acres of land lying at the foot of the hill upon which plaintiff's residence was situated; that the land so taken had been used by plaintiff as a garden and was in a high state of cultivation and was a part and parcel of his entire estate which comprised 69.73 acres; that defendant proceeded with the construction of the nitrate works, erecting buildings, roads, railroads, sewerage systems and such other things as are usually incidental to a large industrial development, and took the top soil from said 1.81 acres of land for

the purpose of filling a depression in adjacent property, enclosed same and other adjoining land in said tract, which was to be used for factory purposes, with a fence, built thereon and on adjoining lands a coal tipple, numerous railroad tracks and a substantial road, entirely and permanently destroying the value of same for agricultural purposes; that the entire tract comprised 1,300 acres; that after the armistice defendant determined to abandon the project and dispose of the properties acquired; that part of the lands were returned to their former owners with compensation for use and damage; part were sold; and the remainder, 320 acres, including said 1.81 acres, defendant still held but had definitely determined to sell; that during the period of activities the use and enjoyment of the residue of plaintiff's estate was impaired by the construction and operation on said 1.81 acres of some five railroad tracks and spurs, a coal tipple and a permanent industrial roadway; that this impairment was enhanced also by the work which was proceeding on the other properties; that the then use of the other lands was not injurious to plaintiff's estate; that defendant's seizure and use of said 1.81 acres of land amounted to a taking of the fee thereof and that the reasonable value of the said fee is $750.00, and that plaintiff was entitled to recover from the defendant the sum of $750.00 therefor; that the damages to the residue of plaintiff's estate resulting from the appropriation of said 1.81 acres, by reason of their severance, by reason of their loss as the convenient garden spot of the estate; by reason of the uses to which they had been put,

particularly during the period of construction (remembering, however, that the agricultural use of the residue of plaintiff's estate during that period was unimpaired and also that it then had at least some utility as a residence) and by reason of the other uses to which said 1.81 acres might in the future, be put, was the sum of $2,250.00 and that plaintiff was entitled to recover from defendant the sum of $2,250 therefor; that the amount of plaintiff's damage by reason of injury to the residue of his estate, by reason of the uses, present and future, of the various different tracts of land which defendant acquired by purchase or condemnation from persons other than plaintiff for the then abandoned nitrate project and, chiefly by reason of the probability that said tract, improved as it had been by defendant by roads, railroads, sewers, fences, water and lighting facilities, was soon to be offered for sale and would probably be bought and used for industrial purposes and that this probability had even at that time a very depressing effect upon the value of plaintiff's estate considered from the standpoint of its best use, that of a fine country residence, was the sum of $5,000.00, but that plaintiff was not entitled to recover said sum and said sum was therefore disallowed.

Assignments of error are as follows:

ASSIGNMENT OF ERRORS.

The court erred in refusing to allow plaintiff to recover from defendant the sum of $5,000 which

the court found to be the amount of plaintiff's damages by reason of injury to the residue of plaintiff's estate by reason of the uses, present and future, of the various different tracts of land which defendant acquired by purchase or condemnation from persons other than plaintiff for the now abandoned nitrate project, and by reason of the probability that said tract, improved as it has been by defendant, by roads, railroads, sewers, fences, water and lighting facilities, is soon to be offered for sale and will probably be bought and used for industrial purposes and that this probability has even at the present time a very depressing effect upon the value of plaintiff's estate considered from the standpoint of its best use, that of a fine country residence.

The question, therefore, to be determined by this court is, whether the owner of a tract of land, part of which is taken under the power of eminent domain and used in connection with other adjoining lands by the public authority as one entire tract and in the prosecution of a single public enterprise, is entitled to receive from the condemnor the damages to the residue of such owner's land caused by the use made and to be made of such entire tract in the prosecution of the single public enterprise, or whether such owner under such circumstances is entitled to receive only the damage to the residue caused by the use made and to be made of that part of such entire tract which is taken from him.

The trial court herein held that plaintiff could recover only the damage to the residue of his land caused by the use made and to be made of that part

of the entire tract which was taken from him, and this, we claim, was error.

We claim that plaintiff is entitled to recover the damage to the residue of his land caused by the use made and to be made of the entire tract, which under the court's finding, would entitle him to recover the sum of eight thousand dollars instead of the sum of $3,000, for which judgment was given.

ARGUMENT.

It seems that the exact question here presented has never been decided either by this court or the Supreme Court of the State of Ohio.

At the time of the taking of plaintiff's 1.81 acres the Secretary of War had authority in law to acquire same by proceedings in condemnation or by purchase.

Section 6911-a, U. S. Compiled Statutes, 1918:

> "Hereafter the Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction, and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants; such proceedings to be prosecuted in accordance with

the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted: Provided, That when the owner of such land, interest, or rights pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay: Provided further, That the Secretary of War is hereby authorized to accept on behalf of the United States donations of land and the interest and rights pertaining thereto required for the above mentioned purposes: And provided further, That when such property is acquired in time of war, or the imminence thereof, upon the filing of the petition for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes, and the provision of section three hundred and fifty-five of the Revised Statutes, providing that no public money shall be expended upon such land until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the state in which the land is located has been given, shall be, and the same are hereby, suspended during the period of the existing emergency. (July 2, 1917, c. 35, 40 Stat. 241, amended, April 11, 1918, c. 51, 40 Stat.)"

It will be noted that Section 6911-a of the U. S. Compiled Statutes provides that the Secretary of

War "may cause proceedings to be instituted * * * for the acquirement by condemnation of any land * * * needed * * * for the construction and operation of plants for the production of nitrates * * *, such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted." The Secretary of War may purchase the land needed by agreement with the owner and, if there is no agreement with the owner, may take immediate possession of the land upon filing of the petition for condemnation.

On August 31, 1918, "agents of the government, acting under authority of the Secretary of War, without compensation or condemnation proceedings, and without plaintiff's consent, entered and took possession of 1.81 acres of land belonging to plaintiff, John V. Campbell, lying in a valley at the foot of the hill upon which plaintiff's residence is situated" (Rec., p. 17).

That the plaintiff, under these circumstances, is entitled to the protection and benefit of the provisions of Section 6911-a of the U. S. Compiled Statutes is a proposition we will submit without argument.

Had the United States of America proceeded in accordance with the provisions of Section 6911-a U. S. Compiled Statutes and had a jury been impaneled to try the issue at the time of the taking, the case presented would have been of the establishment of a nitrate plant in front of plaintiff's residence with its factory buildings, railroads, etc.,

and their effect on the value of his remaining land. The government refuses to condemn and leaves the plaintiff to his present remedy. At the time his suit comes on for hearing the war is over and the nitrates project abandoned. The government has transformed a beautiful rural section into a manufacturing site. It has spent $6,000,000.00 in installing sewage, water and lighting systems, building roads, railroads, factory and storage buildings, and the court below finds in its judgment (Rec., p. 18), that it will in all probability be sold and used for industrial purposes and in its opinion (Rec., p. 13), says that while this probability has "a very depressing effect upon the value of plaintiff's estate considered from the standpoint of its best use, that of a fine country residence," yet it is doubtful if this element is not too speculative and remote to be considered, and cites *Sharp* v. *United States,* 112 Fed. 893. The court does not decide this point.

The facts in the Sharp case were entirely different from those in the case at bar. There the court found first, that the land taken was a tract separate from the owner's other land, and second, that no evidence was offered to show for what purpose the land taken was to be used. Here the land taken was admittedly a part of a tract on which plaintiff's residence stands. Six million dollars had been spent in adapting it and adjoining lands to industrial purposes and it was at the time of trial being used for storage purposes.

The court did not pass upon the above question because it found that damage to plaintiff's residue

was limited to that arising from the use made of the land taken from him (Rec., p. 13), and discusses one provision of the Ohio Code, Section 11053, as tending to support his view.

The taking of plaintiff's 1.81 acres by the Secretary of War without compensation or condemnation proceedings and without plaintiff's consent created an implied contract on the part of the United States of America to compensate plaintiff for his damages caused by such taking in the same manner as plaintiff would have been compensated through proper proceedings in condemnation.

United States v. *Great Falls Manufacturing Co.*, 112 U. S. 645.
United States v. *Lynah*, 188 U. S. 445.
United States v. *Gress*, 242 U. S. 316.
United States v. *North American Transportation & Trading Co.*, 253 U. S. 330.
Note, 28 L. R. A. (N.S.) 968.

Pertinent constitutional and statutory provisions with reference to condemnation proceedings by the United States of America in connection with lands located in the State of Ohio are as follows:

Article V of the Amendments to the Constitution of the United States:

"* * *; nor shall private property be taken for public use without just compensation."

Article I, Section 19 of the Constitution of the State of Ohio:

"Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war, or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money and such compensation shall be assessed by a jury, without deduction for benefit to any property of the owner."

Article XIII, Section 5 of the Constitution of the State of Ohio:

"No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law."

Section 13768 of the General Code of Ohio:

"Be it enacted by the General Assembly of the State of Ohio, That whenever it shall become necessary for the United States of America to acquire title to a tract of land in this state for any purpose, and the state shall have given its consent to such acquisition it shall be lawful for said United States of

America to acquire such land by appropriation; and for such purpose the 'Act prescribing the mode of assessment and collection of compensation to the owners of private property appropriated by and to the use of corporations,' passed April 23, 1872, and all acts amendatory thereof, are hereby made applicable, and said United States, in appropriating such property shall, in all respects, be governed by the acts herein referred to, and such other acts supplemental thereto and amendatory thereof as may be passed and be in force when such proceedings take place; provided, that the United States may pay the costs, including such reasonable attorney fees as may be allowed by the court, to the person or persons whose property is sought to be appropriated, and refuse to make the appropriation, if in their judgment the compensation assessed is too great to justify the appropriation."

Section 13770 of the General Code of Ohio:

"That the consent of the State of Ohio is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in this state required for sites for custom houses, court houses, post offices, arsenals, or other public buildings whatever, or for any other purposes of the government."

Section 11042 of the General Code of Ohio:

"In such case the corporation may file a

petition with the probate judge, verified as in a civil action, containing a specific description of each parcel of property, interest, or right, within the county, sought to be appropriated, the work, if any, intended to be constructed thereon, the use to which the property is to be applied, the necessity for the appropriation, the name of the owner of each parcel, if known, or if not known, a statement of that fact, the names of all persons having or claiming an interest, legal or equitable, in the property, so far as they can be ascertained, and a prayer for its appropriation."

Section 11053 of the General Code of Ohio:

"When a jury is filled, the probate judge shall administer to them the following oath: 'You, and each of you, do solemnly swear that, according to your best judgment, you will justly and impartially assess the amount of compensation due to the proper owners in the cases which will be brought before you in this proceeding, by reason of the appropriation of their property described in the petition, to the use of (here name the corporation) in the proceeding now pending, irrespective of any benefit from any improvement proposed by such corporation; and you do further swear that in assessing any damages that may occur to such property owners, by reason of the appropriation, other than the compensation, you will further ascertain how much less valuable the remaining portion of such property will be in consequence of such appropriation; this you swear as you shall answer to God."

Sections 11042 and 11053 of the General Code must be read together.

The condemnor files a petition containing a description of each parcel of property *"within the county, sought* to be appropriated," the work to be constructed thereon, the use to which the property is to be applied, the necessity for the appropriation * * * and a prayer for its appropriation. All of the property sought to be appropriated within the jurisdiction of the court is described in one petition, the work to be constructed on all the property is described, the use to which all the property is to be applied is set forth, the necessity for the appropriation of all is set forth and the prayer is for the appropriation of all.

It is one appropriation, not two, or twenty or two hundred, as there may be two or twenty or two hundred parcels and owners and the duty of the jury in accordance with the direction of Section 11053 is to "justly and impartially assess the amount of compensation due to the proper owners * * * "and you do further swear that in assessing any damages that may occur to such property owners, by reason of the appropriation, other than the compensation you will further ascertain how much less valuable the remaining portion of such property will be in consequence of such appropriation." If there is anything in these sections to suggest that the inquiry should be limited to an assessment of damages arising from the use to which each particular parcel is to be put we fail to see it. Such a suggestion has apparently never been made to any court of Ohio, nor has it spontaneously arisen in the mind of such court with sufficient force to make it the subject of a "quaere."

The trial court found nothing in the decisions of Ohio courts contrary to his ruling and cites *C. & P. R. R.* v. *Ball*, 5 O. S. 568, 575, and *Grant* v. *Hyde Park*, 67 O. S. 166 (trial court's opinion, Rec., p. 14). In *Grant* v. *Hyde Park*, at page 178, the court quotes with approval certain language of the court in *C. & P. R. R.* v. *Ball* as follows:

> "The provisions of the constitution of this state on this subject, are somewhat different from the provisions in the constitutions of some of the other states. 'Full compensation' is required to be made to the owner in money for the appropriation of his property, as a condition precedent. To be a full compensation, it must be a remuneration or recompense for that detriment or loss to the owner in the value of his property arising from the taking of his property in connection with the use for which it is taken. Where a piece or strip of land is taken and severed by the appropriation from its connection with other land of the owner, some elements of compensation necessarily enter into the computation besides the abstract value of the number of feet or acres of ground actually taken. These elements of compensation may be comprehended in the following: First, the abstract value of the quantity of ground taken; second, the value arising from the relative situation of the land, taken in its connection with the residue of the owner's land from which it is severed; and third, the effect upon the value of the residue of the owner's land arising from the uses for which the appropriation is made. These grounds of compensation will give the landowner a recompense for the loss in the value

of his property, caused by the appropriation for the special purposes or use for which it is authorized."

In *C. & P. R. R.* v. *Ball*, 5 O. S. 568, at page 576, the court says:

"It is true, that speculative prospective detriment or injury to the value of the residue of the land, either by means of the severance therefrom of the land taken, or by the use and workings of the railroad, is not to be taken in the estimate; but the compensation is to be confined to such loss and injuries in the value of the owner's property as are appreciable at the time as the necessary or natural consequences, fairly and reasonably expected to follow, from the appropriation made to the uses of the railroad, including in the incidental injury to the value of the residue of the land, the deterioration in value from the necessary inconvenience and annoyance in the enjoyment of the same arising from the operation of the railroad."

Let us see if these declarations of the Ohio law can be reconciled with the law as interpreted by the trial judge. A railroad company condemns a strip of land 60 feet wide for its right-of-way through a subdivision, taking 30 feet off the ends of lots abutting end to end on each other. It determines, for reasons satisfactory to itself, that it will place its tracks, not in the middle of its right-of-way, but wholly on the 30 feet taken from the owners of one row of lots, leaving the 30 foot strip taken from the owners of the other row for means

of access to its tracks, telegraph poles and wires and switching devices. Would the assessment of compensation to the owners of the second row of lots be for "deterioration in value" arising from user for poles, wires and switching devices and not user for tracks and operation of trains? Under the ruling of the trial court the answer is "yes".

Suppose another case. Adjoining lots in a subdivision are 25 feet in front by 150 feet deep. The railroad company appropriates 30 feet from the front of each lot and in the strip so appropriated tracks are laid. One owner's residence is on the portion of his lot not taken. Would the railroad company be heard to say that only the smoke, dust, fumes and sparks arising from trains while actually on the 25 by 30 feet of land taken from such owner might be considered in assessing damage to the residue of his property? Under the ruling of the trial court the answer is "yes". "But," the railroad company says, "the velocity of our trains when passing that point will be such that air currents will be created which will draw all of the smoke, dust, fumes and sparks arising on this 25 by 30 feet plot to the land of such owner's neighbors." The court says, "When you prove that the owner is entitled to no recovery." "But," says the owner, "while the railroad's contention is probably correct, it is equally true that the smoke, dust, fumes and sparks arising from the operation of its trains on the land of my neighbors are drawn by these same currents to my land and home." "That," says the court, "is damnum absque injuria, and you can not recover."

We submit that these are fair illustrations of the effect of the rule laid down by the trial court and that such a rule is wholly inconsistent with that adopted by the Supreme Court of Ohio in *Railroad* v. *Ball, supra,* p. 576, that the owner is entitled to recover for

> "Such loss and injuries in the value of the owner's property as are appreciable at the time as the necessary or natural consequences, fairly and reasonably expected to follow, from the appropriation made to the uses of the railroad, including in the incidental injury to the value of the residue of the land, the deterioration in value from the necessary inconvenience and annoyance in the enjoyment of the same arising from the operation of the railroad."

No other court has gone so far as the Supreme Court of Ohio in extending the protection of a similarly worded constitution to the property of its citizens.

Thus in *McComb* v. *Akron,* 15 Ohio 474, decided in 1846, it was held that an abutting property owner who had improved his lot with reference to an established grade was entitled to recover the diminution in the value of his property occasioned by a change of grade lawfully made.

The question was re-examined by the court in *Crawford* v. *Delaware,* 7 O. S. 460. At page 465 the court says:

> "This decision is in direct conflict with English and American cases (citing cases).
> • • •

"The remark of Bronson, J., in *Radcliff's Executors* v. *Mayor of Brooklyn*, 4 Comst. 205, that 'if in *McComb* v. *Town of Akron*, the Supreme Court of Ohio intended to hold that persons, whether artificial or natural, were answerable for the damages which might result to an adjoining landowner from the grading of a street, though the act was done under ample authority, and in a proper manner, the case is in conflict with many decisions, and can not be law beyond the State of Ohio,' is probably true. And it is also true, that the Supreme Court, in making that decision, were aware that it was in direct conflict with the decisions both in England and America."

And at pages 470 and 471 the court say:

"We hold that when the avenue to the place of business of the lot-owner, and his use of the street as an incident to his permanent erections, is thus blocked up or taken from him, after the establishment, and by the alteration of a grade, the private rights of the owner, inherent in and incident to the erections upon the lot, are invaded, and no curt phrase, like damnum absque injuria, can conceal the invasion or the substantial injury.

It is as positive and substantial an injury to private property, and as direct an invasion of private right, incident to a lot, as if the erections upon the lot were taken for public use. It comes not within the letter, but manifestly within the spirit of the provision of the constitution which requires compensation for property taken for public use.

In thus affirming the case of *McComb* v. *Akron*, we do not deny to the corporate authorities of cities and towns a control over the

use, the grade, and regrade of streets. But if, after establishing the grade, they block up or cut down the street before one man's house for the benefit of others, doing a substantial injury, the rights of property have been invaded, and the plainest principles of justice require compensation."

In *Cohen* v. *Cleveland*, 43 O. S. p. 190, the syllabus is as follows:

"Under the acts of 1872 (69 Ohio L. 138; 73 Ohio L. 107; 3 Rev. Stats. 616, 617), a viaduct sixty-four feet wide, with a level roadway was constructed in Cleveland across the Cuyahoga river. On the south side of Superior street, between Water street and the river, a distance of 768 feet, the city condemned a strip of ground, and the viaduct was constructed over that strip and over part of Superior street, about thirty-seven feet being over the strip opposite Cohen's premises, and the balance over the street, so that in effect Superior street, which was ninety-three feet wide, is reduced in width between Water street and the river, and opposite Cohen's premises its present width is sixty-six feet. The elevation of the roadway of the viaduct above Superior street gradually increases from Water street to the river, and opposite the premises of Cohen, which are on the north side of Superior street, midway between Water street and the river, the elevation is forty-five feet, and it is alleged that the viaduct diverts travel from that part of Superior street, impairs the light and air to Cohen's premises, causes noise and the jarring of his house day and night, and has impaired the value of his property and reduced its rental value. Held:

1. The viaduct is a lawful structure.
2. On proof of the alleged injury, Cohen is entitled to damages.
3. Cohen is not owner of a lot 'bounding or abutting upon the proposed improvement,' within the meaning of the municipal code, section 564 (Rev. Stats., Sec. 2315), and hence it was not necessary for him to file a claim for damages under that section."

In *Mansfield* v. *Balliett*, 65 O. S. 451, the first two paragraphs of the syllabus are as follows:

"1. Riparian rights are property within the purview of section 19 of the Bill of Rights, of which the owner can not be deprived without just compensation, though taken for, or subjected to, a public use.
2. Any actual and material interference with such rights, which causes special and substantial injury to the owner, is a taking of his property."

In that case the City of Mansfield had emptied sewage into a stream which flowed to and through the plaintiff's farm, thereby polluting its waters. He was held to be entitled to recover as for a "taking" of his property.

The change in state constitutions discussed by this court in *Richards* v. *Washington Terminal Railway Co.*, 233 U. S. 546, by the Supreme Court of Tennessee in *Lewisburg & N. R. R. Co.* v. *Hinds*, 134 Tenn. 293, and by Lewis on Eminent Domain, Section 346, by the insertion of the word "damaged" was not necessary in Ohio to secure to its citizens the protection afforded by the change in

other states. The principle underlying the Ohio decisions is that anything done for the public good which results in substantial diminution in the value of private property invokes the application of Article I, Section 19 of the Constitution of Ohio and must be made good by a money equivalent.

The only case decided by this court which we have been able to find which may be in point is *Richards* v. *Washington Terminal Railway Company,* 233 U. S. 546, which was cited by the court below as sustaining its decision. We believe that a careful reading of that case will disclose that in it Your Honors were in full accord with the principles pronounced by the Ohio Supreme Court, and that that case is authority for the contention of the plaintiff.

The difference between the position in law of an owner part of whose land was taken and one from whom no land was taken was recognized by the trial court in his opinion (Rec., p. 15), where he says: "Had none of plaintiff's land been taken, works on other lands less than nuisance, would not have given rise to any action at all." Many of the cases cited in support of his conclusions are cases in which none of the claimant's land was taken. This was so in *Richards* v. *Washington Terminal Co., supra,* and the facts in that case were such as to cause this court to give careful consideration to the elements of damage pertaining both where land of the owner is taken and where it is not. The trial court appears to have misunderstood the facts of that case. In his opinion (Rec., p. 14), he speaks of smoke and gas given off by

locomotives on tracks adjacent to the owner's land. The statement of the case shows that the claimant's land was nowhere adjacent in the sense of abutting or being contiguous to either tracks or tunnel. At page 549 this court say:

> "From the nearest portion of plaintiff's house to the center of the south portal, the distance in a straight line is about 114 feet, there being three intervening dwelling houses, two of which have been purchased and are now owned by defendant."

And at page 551:

> "At the same time, there is no exclusive and permanent appropriation of any portion of plaintiff's land, which, indeed does not even abut upon defendant's property."

This also appears from the third paragraph of the syllabus. It is perfectly apparent from the reading of the case that the only reason the plaintiff was not held entitled to recover for all the damage done to his property both by operation of trains and the fanning of smoke and gas from the tunnel was that none of his property was actually appropriated. The opinion concludes, p. 557:

> "Construing the acts of Congress in the light of the Fifth Amendment, they do not authorize the imposition of so direct and peculiar and substantial a burden upon plaintiff's property, without compensation to him. If the damage is not preventable by the employment at reasonable expense of devices

> such as have been suggested, then plaintiff's property is 'necessary for the purposes contemplated,' and may be acquired by purchase or condemnation (32 Stat. at L. 916, chap. 856, sec. 9), and pending its acquisition defendant is responsible. If the damage is readily preventable, the statute furnishes no excuse, and defendant's responsibility follows on general principles."

Suppose the tunnel company, finding it impracticable to prevent the nuisance complained of in that case, followed the suggestion of this court that it condemn or purchase this non-contiguous property. How would the owner's compensation be assessed? Would it not be the fair market value before the railroad and tunnel were built? Certainly the railroad company would not be heard to say it is the value as diminished by the smoke, gas, noise, vibration and dust caused by operation of trains outside the tunnel.

If something can be done on one man's land which amounts to a taking of another's land and entitles him to recover its full value, why may not the condemnor whose necessity requires a part of one's land, thereby invoking the operation of the Fifth Amendment, be required to pay the surrendering owner all that he loses by reason of his surrender to the public's necessity?

> "The power rests upon the public necessity, and can only be exercised where such necessity exists."

The true measure, we submit, will be found in the following quotation from the opinion of Mr. Justice Phillimore in the case of *Rex* v. *Mountford*, L. J., 1906, K. B. 75, p. 1003, at p. 1008:

> "I have had the opportunity of reading my brother's judgment and I concur in the conclusion at which he has arrived. But I have had, and still have, considerable doubts. The sentence in the judgment of Mr. Justice Crompton in the Stockport case (33 L. J. Q. B. 251), in which he speaks of 'mischief being caused by what is done on the land taken,' is not to be pressed too literally. If a portion of an owner's land is taken for a railway I should be of the opinion that he could recover damage for smoke and noise arising in the process of shunting though the land taken from him carried only a plain line of rails and the sidings were fifty yards away. The principle upon which the case proceeded is that the owner who has lost his veto by reason of compulsory powers being given to the company, should be held entitled to such compensation in respect of lands which he retains as he would reasonably have stipulated for if he were a willing seller of the land which is to be taken."

The Secretary of War in this case was the judge of the necessity of plaintiff's land. He was authorized to purchase by private agreement. Suppose in this case without compulsory power he had said to plaintiff: I must establish a nitrate plant in the Miami Valley. I can not do this without taking part of your land. What price do you ask?

Plaintiff, willing to sell at a fair price, answers: The land you want is worth comparatively little, but the location of such a plant as you propose at my front door will destroy the value of my residence. The Secretary answers: The plans I have contemplate the location of an ornamental office building on the ground I shall acquire from you which will in no way diminish the value of your residence. But the plaintiff says: On the land you will acquire from my neighbor and almost as near to my residence your plan calls for a factory, which, when in operation, will have the same effect as if built on my land and, as you can't go forward with your project without my land, I must refuse to sell unless we can agree on a fair estimate of the damage to my residence from all you expect to do. Is anything less than that "fair" or "just" or "full" compensation? And is not that exactly what the Fifth Amendment of the Federal Constitution, and Article I, Section 19 of the Ohio Constitution were intended to secure?

It is because some owners are unwilling to sell at any price, and others, with necessity driving the buyer, will demand exorbitant prices, that compulsory powers are given or held to exist. The result to be attained through them is that which would be reached by two reasonable persons, one willing, but not compelled, to buy, and the other willing, but not forced, to sell. A most exhaustive examination of the power of eminent domain and the principle on which compensation is founded will be found in the report of *Lewisburg & N. R. R.*

Co. v. *Hinds,* 134 Tenn. 293. At page 306 the court says:

> "We adopt from a very recent decision of the Supreme Court of the United States the common-law rule, as we understand it, governing the rights of mere adjacent owners, no part of whose property has been taken for the public improvement, in respect of mere consequential damages:
>
> " 'Any diminution of the value of property not directly invaded nor peculiarly affected, but sharing in the common burden of incidental damages arising from the legalized nuisance, is said not to be a 'taking' within the constitutional provision. The immunity is limited to such damages as naturally and unavoidably result from the proper conduct of the road and are shared generally by property owners whose lands lie within range of the inconveniences necessarily incident to proximity to a railroad. It includes the noises and vibrations incident to the running of trains, the necessary emission of smoke and sparks from the locomotives, and similar annoyances inseparable from the normal and non-negligent operation of a railroad. *Northern Transp. Co.* v. *Chicago,* 99 U. S. 635, 641, 25 L. Ed. 336, 338; *Beseman* v. *Pennsylvania R. Co.,* 50 N. J. Law, 235, 240, 13 Atl. 164, affirmed in 52 N. J. Law, 221, 20 Atl. 169. That the constitutional inhibition against the taking of private property for public use without compensation does not confer a right to compensation upon a landowner, no part of whose property has been actually appropriated, and who has sustained only those consequential

damages that are necessarily incident to proximity to the railroad, has been so generally recognized that in some of the states (Arkansas, California, Colorado, Georgia, Illinois, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, South Dakota, Texas, West Virginia and Wyoming are, we believe, among the number) constitutions have been established providing, in substance, that private property shall not be taken or damaged, for public use without compensation. The immunity from liability for incidental injuries is attended with a considerable degree of hardship to the private landowner, and has not been adopted without some judicial protest. But, as pointed out by Chief Justice Beasley in the *Beseman Case,* 50 N. J. Law, at page 238 (13 Atl. 164), if railroad companies were liable to suit for such damages upon the theory that with respect to them the company is a tort-feasor, the practical result would be to bring the operation of railroads to a standstill. And, on the whole, the doctrine has become so well established that it amounts to a rule of property, and should be modified, if at all, only by the lawmaking power. But the doctrine, being founded upon necessity, is limited accordingly.' *Richards* v. *Washington Terminal Co.,* 233 U. S. 546, 554, 34 Sup. Ct. 654, 657, 58 L. Ed. 1088, 1092 (L. R. A. 1915A, 887).

"Relief is granted in several states under constitutions and statutes which authorize recoveries when any property has been 'damaged' or 'injured' by a public improvement, and in England, where land has been 'injuriously affected.' Among these states are

those mentioned in *Richards* v. *Washington Terminal Co.*, and in addition, we believe, the states of Oklahoma, Virginia, Washington, Minnesota, Kentucky, and Alabama. 1 Lewis on Eminent Domain (3rd Ed.), Sec. 346, and note; 10 Ruling Case Law, pp. 164, 165, Sec. 145."

And at page 310:

"Our constitution merely guards against the taking or appropriation of private property for public use without just compensation. Article I, Section 21. Our statutes in terms authorize and regulate the taking of property under the right of eminent domain, providing for the assessment of damages to the owner of the land actually taken, and for the ascertainment of the damages to the rest of the land incidental upon the taking of a part, providing, as construed by our cases, in substance, that such incidental damages may be lessened by incidental benefits, and that the difference shall constitute the sum to be paid as damages to the land not taken. Shan. Code, Section 1857. Our cases very clearly point out how the damages are to be ascertained for the land actually taken. They are not so clear on the subject of incidental damages to the land not taken. While several elements of incidental damages have been mentioned in these cases, no adequate treatment of the matter has been attempted; but it has been said in several of the cases that the subject is inherently full of difficulty.

"The difficulty, as we think, springs, in part at least from the ambiguity latent in the word 'damages,' the two meanings, which it bears,

representing concepts quite distinct. From this viewpoint we shall consider the language of our Code. That section (Shan. 1857) reads:

'In estimating the damages, the jury shall give the value of the land (taken) without deduction, but incidental benefits, which may result to the owner by reason of the proposed improvements may be taken into consideration in estimating the incidental damages.'

"The word 'damages' here used does not mean a sum of money, exacted by retributive justice for a legal injury inflicted, but purchase money for property taken, pursuant to law, for the use of a public improvement and compensation for the loss in value incidentally imposed upon the residue of the tract as a consequence of the taking of a part. No wrong has been done, and hence no injury ('injuria') in the legal sense produced, therefore there are no damages (an inapt expression, *Wray* v. *Railroad*, 113 Tenn. 544, 551, 82 S. W. 471), due in the sense in which that term is understood in actions ex delicto. The clearing up of this ambiguity arising from the use of the term 'damages' in the section referred to, relieves us, as we think, from some confusion of thought, remembering that 'damages' in the true sense is a term indicating a monetary exaction, imposed on a wrongdoer, as a means of compelling him to make reparation to one on whom he has inflicted an injury in the legal sense, that is, a legal wrong, either upon persons or property, or by a breach of contract, which latter is in a sense an injury to a property right. The damages, so-called, in the kind of case now before the court, a condemna-

tion proceeding under the law of eminent domain, arise in a sense, and to a degree, ex contractu, although one of the parties is made to enter into the arrangement through compulsion of law. It is in truth almost as certainly upon a general basis of contract, as when a court of chancery undertakes to put on the market the land of an infant, or of any other person under disability when a conversion from realty into personalty is desired as being for the best interest of such person. There is, it is true, no meeting of minds, as in the case of a typical contract, since after the condemnor indicates through proper pleadings a desire for certain realty, the state, through its courts, assumes to act for both in effecting the transfer. The principle on which it acts is that the owner of the land shall be treated as one offering it for sale, at a fair price, while not being under any stress of circumstances that would induce him to sacrifice his property, and the condemnor as an intending buyer, who is alike free from stress, as not being forced to buy. (Citing many cases.)

"'It is not in the nature of a wrongful taking, for which damages are to be assessed. Nor is it a claim for any wrong or damage done, but the appropriation of the property is legal and rightful, as much so as if the owner had voluntarily sold it to the company, and the only open question was, What is a fair price for the property? What is its value?' *Woodfolk* v. *Railroad Co., supra,* at page 437 of 2 Swan.

"Two persons so dealing would probably reach a result whereby the land would pass from the seller to the buyer on a just appraisal. The court, through its fit agencies, a commission or a trial of the matter by a jury

with the aid of witnesses, ascertains the price for both, thus completing that feature of the assumed relation. It fixes for the parties the price of the land taken, based on the value of the land, taking into consideration its shape or form, its area, and all of its capabilities or constituents of value. Authorities supra.

"But at this point another element arises in the assumed negotiations. The parcel of land selected and priced is to be cut out of a larger parcel or tract. A prudent negotiator, before closing the contract, would consider how the rest of his land would be affected in value by selling off the portion desired for the uses of any given public improvement. The owner, as stated, occupies, fundamentally, though not formally, a contractual status, and, if acting for himself, would save himself from any loss in the latter aspect, either by adding the difference onto the price of the land sold, or by the exaction of a separate sum. The law, representing him in a condemnation proceeding, assumes the right to sell for him, both to fix the price he shall receive for the land actually used and the amount which he shall receive as compensation for the lessened value of the part not taken. As to the land to be taken, it has engaged to treat the owner from the standpoint of one who is offering his land for sale to another who wishes to buy, as if neither were compelled to enter the transaction. Where this theory or principle is employed as a basis for effecting the transfer of the land that is to be actually used, what warrant can there be for abandoning it when that stage in the affair is reached at which it becomes necessary to estimate the impairment in value of the residue of the tract? What warrant is there for giving the single word 'damages'

used in Section 1857 of Shannon's Code, one meaning when applied to the strip taken and another when applied to the residue of the land? If the theory be appropriate and just as a guiding principle in the one case, it is equally so with the other, since both are parts of one transaction, and the purpose is to ascertain the true amount of the compensation to be paid for the land, and for the depreciation in value of the land not taken. We do not overlook the true nature of the right of eminent domain (22 L. R. A. [N.S.] 7, 93, 94), as an exercise of sovereign power; and it may be conceded as possible that the sovereign needed not to adopt the special rule we have indicated; but that it has been adopted through a just construction of the constitution and the laws is altogether clear, and, having been adopted, it represents a principle that controls. The sovereign, under the requirements of the constitution (some authorities hold that the requirement is inherent, without regard to the constitution, but we need not go into that phase of the matter)—the sovereign, we say, being under the necessity of ascertaining the sums for compensation we have mentioned, was bound to devise some plan for the execution of the purpose. The method we have indicated was adopted, and must be followed. No method was adopted for the relief of the owners of mere neighboring or adjacent lands, to whom incidental loss accrued, by reason of the lawful establishment and operation of the public improvement. They were left to the common law, which gives no remedy for mere consequential damages, but only in case the injury amounts to a nuisance or taking. The owner of lands of which a part was taken was left in the same class as to his other adjacent

land not part of the land out of which a portion was taken. 85 Am. St. Rep. 299, 300, note.

"Pursuing the thought from the standpoint of one trying to ascertain how much the residue of the land is lessened in value by the condemnation of a part, is it lawful, as above intimated, to consider the proximity of the improvement itself as a ground of impairment of market value of land? This rule was applied in the Alloway case, supra. There it was held proper to estimate as an element of depreciation in value, the proximity of the reservoir, and the danger of its breaking at some future time, and devastating the rest of the tract, notwithstanding most careful construction, the danger arising from the nature of such structures, and the impossibility of guarding with absolute security against the constant pressure of a vast body of water.

"The same rule obtains in other jurisdictions. *Blesch* v. *Railroad Co.*, 48 Wis. 188, 2 N. W. 113; *Concord R. R. Co.* v. *Greely*, 23 N. H. (3 Foster) 237; *Railroad* v. *Stickney*, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773; *Railroad* v. *Church*, 104 N. C. 531, 10 S. E. 761; *Railroad* v. *Ball*, 5 Ohio St. 575. In fact, anything may be taken into consideration which would, in an appreciable degree, capable of ascertainment in dollars and cents, injure the market value of the land so left. *Paducah & Memphis R. R. Co.* v. *Stovall*, 12 Heisk. 1; *Acker* v. *Knoxville*, 117 Tenn. 224, 231, 232, 96 S. W. 973; *Kersey* v. *Schuylkill River East Side R. Co.*, 133 Pa. 234, 19 Atl. 553, 7 L. R. A. 409, and note, 19 Am. St. Rep. 632; 2 Lewis, Em. Dom. (3rd Ed.), Sec. 748, 710; 4 Sutherland on Damages, Sec. 1065; 10 Am. & Eng. Encyc. Law, 1171, 1173; 5 Encyc. of Ev., p. 214; 15 Cyc. 690.

"In estimating the extent of lessened value of the land left after appropriating a part, that is the damages so-called, it is proper to consider the danger of fire, the annoyance that will probably occur from noise, smoke, cinders, dust, or noisome odors or vapors from engines, and the jarring caused by the passing of trains upon the track over the land taken. *Little Rock, etc., Ry. Co.* v. *Allen*, 41 Ark. 431; *Elizabeth, etc., R. R. Co.* v. *Combs*, 10 Bush. (Ky.) 382, 19 Am. Rep. 67; *Chicago, etc., R. R. Co.* v. *Atterbury*, 156 Ill. 281, 40 N. E. 826; *Matter of New York, etc., R. R. Co.*, 15 Hun. (N. Y.) 63; *Comstock* v. *Clearfield, etc., Ry. Co.*, 169 Pa. 582, 32 Atl. 431; *Weyer* v. *Chicago, etc., R. R. Co.*, 68 Wis. 180, 31 N. W. 710; *Chicago, etc., Ry. Co.* v. *Nix*, 137 Ill. 141, 27 N. E. 81; *Bangor, etc., R. R. Co.* v. *McComb*, 60 Me. 290; *County of Blue Earth* v. *St. Paul, etc., R. R. Co.*, 28 Minn. 503, 11 N. W. 73; *Bowen* v. *Atlantic, etc., R. R. Co.*, 17 S. C. 574; *Tidewater* v. *Shartzer*, 107 Va. 562, 59 S. E. 407, 17 L. R. A. (N.S.) 1053; *Idaho Western R. Co.* v. *Columbia Conference*, 20 Idaho, 568, 119 Pac. 60, 38 L. R. A. (N.S.) 497, 507; *Savannah, A. & N. R. Co.* v. *Williams*, 133 Ga. 679, 66 S. E. 942; *Omaha H. & G. R. Co.* v. *Doney*, 3 Kan. App. 515, 43 Pac. 831; *Danville & I. H. R. Co.* v. *Tidrick*, 137 Ill. App. 553, 557; *Railroad* v. *McAuliff*, 43 Kan. 187, 23 Pac. 102; *Sabin* v. *Railroad*, 25 Vt. 370; *Shano* v. *Bridge Co.*, 189 Pa. 246, 42 Atl. 128, 69 Am. St. Rep. 808. The rule on this subject is well expressed in the following excerpt from Sutherland on Damages, Vol. 4, Sec. 1065:

" 'If the land is rendered less valuable because it is exposed to fire, or if access is rendered more difficult, or if the use of the remainder is more inconvenienced by reason of

the railroad, or if its value is depreciated by the noise, smoke, or increased dangers caused by such use, all these are to be included in the estimate of damages; not that witnesses are to be called upon to estimate the damages for each or any of them, for though they enter into the estimates, the question is, What is the market value of the land without, and what is the market value of the remainder of the piece with, the railroad? In other words, what is the value of the piece which is taken and how much is the residue depreciated in its market value by its separation and by the construction of the railroad? These two sums, added together, cover the amount of compensation to which the injured party is entitled.'

Again in Section 1066:

"'Where a part has been taken for a railroad it is proper to consider all the inconveniences from the sounding of whistles, ringing of bells, rattling of trains, jarring of the ground, from smoke, invasion of privacy, and the deprivation of light, means of access, and like matters so far as they severally arise from the use of the strip taken and opened up to use, excluding all common and indirect damages; that is, such as affect the owner in common with all other members of the community.'

"It is insisted in behalf of the plaintiff that our cases have already fixed, as the only true criterion of incidental damages, the loss caused by the special physical consequences resultant from the erection of the railroad as distinguished from those caused by its operation, such as the separation of the land, one part

from the other, by the railroad track, the making of cuts and fills, the inconvenience of reaching barns and other outhouses, the impairment of access to roads or streets, and the like, and that the recognition of impairment to the market value of the residue of the land not taken, from other causes, is a distinct departure from precedent. This is a mistaken view. In several of our cases the obvious physical inconvenience just referred to, and others like them, are mentioned as instances, but in no case are they held exclusive, or held out, or suggested, as covering the whole field. We have no case which holds that impairment of market value is not a true criterion. On the contrary we have two in which it was held that this was a proper matter to consider in estimating the damages. *Paducah & Memphis Railroad Co.* v. *Stovall.* 59 Tenn. (12 Heisk.) 1, 3, 4; *Acker* v. *Knoxville, supra.* In the first of these cases the court approved as unexceptionable, the charge of the trial judge in which he had instructed the jury to consider as an element 'the increase or decrease in the price of the remainder of the tract.' In the second case the direct point was ruled, in a controversy between an abutting owner and the City of Knoxville, under a statute allowing damages resulting from a change in the grade of the streets. As indicated in the last case, the only way in which the open physical inconveniences of the kind we have previously referred to could be made available as elements of damage would be the extent to which they had impaired the market value.

" 'These incidents,' said the court, 'would be all such as one would take into consideration in estimating the value of the property, after the grading had been completed. So

that the test of the difference between the market value, just before the grading and just afterwards, would be a true one, and would indicate the real injury suffered; the incidents referred to sufficing to direct the attention of the jury to the special elements of the injury and the benefits arising out of the grading, and necessary to be taken into consideration to forming an estimate of the value of the property before and after.' But it was never supposed in these cases, or in any other of our cases, that if other elements impairing market value appeared that these were to be excluded. Indeed, as we have already pointed out, in the case of *Alloway* v. *Nashville, supra,* the damages to be apprehended from the mere propinquity of the erection must be considered in estimating the incidental damages. Further, if, as insisted by the plaintiff, incidental damages can be such only as are caused by the construction of the road, as distinguished from those caused by its operation, why was the rule laid down in *Railroad* v. *Raine,* 114 Tenn. 569, 572, 86 S. W. 857, that such damages should be estimated on the basis that the entire strip taken would be occupied by as many tracks as practicable? There could be no reason for this rule, except that the incidental damages caused by the operation of the road were to be assessed, as well as those caused by its construction. Such damages from operation would be the danger of fire, the noise, smoke, and vibration, which we have already referred to. In *Wray* v. *Railroad, supra,* speaking of incidental damages, the court said (113 Tenn., page 557, 82 S. W. 474):

"They 'may consist in the necessity of new fences and walls, the removal of outbuildings,

or the danger or inconvenience of getting to them, * * * and many other things' (citing Lewis on Eminent Domain, Sec. 496).

"In that section of the edition then extant, now section 739 of the third edition, so referred to and approved by this court, the author, after referring to the elements just mentioned, and others of a similar nature, then proceeds (page 1312):

" 'In an inquiry whether, and how much, the part of a farm not taken for railroad right-of-way is depreciated in value by the appropriation of a part, evidence as to the size of the farm; the purpose for which it was used; the improvements thereon, and how located; the direction of the road across the farm; the cuts and fills made or to be made in the construction of the road; the width of the right-of-way; the height of embankments; the depth of ditches; the inconvenience in crossing the track from one part of the farm to another; the liability of stock being killed; the danger from fire from passing trains—are all facts competent for the jury's consideration in determining the depreciation in value of the remainder of the farm' (citing *Omaha Southern R. R. Co.* v. *Todd,* 39 Neb. 818. 58 N. W. 289).

"In the case just referred to it was also said that 'everything which tended to show that the continuing presence and operation of the road across the farm tended to make it more valuable was competent, and everything which tended to show that the continuing presence and operation of the road across the farm depreciated its market value was competent.' Every element arising from the construction and operation of the work or improvement which, in an appreciable degree, is capable of

ascertainment in dollars and cents, that enters into the diminution or increase of the value of the particular property, is properly to be taken into consideration in determining whether there has been damage and the extent of it.

"So it appears that the doctrine laid down in the present case is by no means a novelty in our State. In the present opinion we have only stated some additional particulars necessarily falling within the rule, and have endeavored to offer certain reasons which seem to us to justify the doctrine as resting in sound principle and substantial justice. We need say no more than we have already said as to the overwhelming weight of authority in other jurisdictions as to the propriety of considering the matter of propinquity and all that it reasonably portends in the way of direct injury to the property and hence impairment of market value. Indeed we think it would be an impeachment of the fairness of our jurisprudence if the rule were otherwise. It would be nothing less than saying that our courts could, not only within our constitution, but under a true conception of justice, compel one of our citizens to surrender part of his land for, say, the erection of a public pesthouse, and receive no compensation for injury to the market value of the rest of his tract. To exercise such a power would be, not to administer justice, but to inflict oppression. Moreover, it would deny and destroy the very principle by which the courts profess to be guided in conducting such matters—that the landowner should be considered as one willing, but not compelled, to sell, and the condemnor as one willing, but not compelled, to buy. No one can suppose that the

landowner would consent to sell a specific part out of a tract without considering how the taking of that part would affect the rest of the tract, and without exacting compensation for the lessening of the market value of the latter thereby. He would do this, if left free to act, by adding to the price of the part sold. In condemnation cases he can not do this, but must look to the obtention of a separate sum from the purchaser to cover such incidental damages. Can anyone suppose that if free to contract, he would demand anything less than the whole damage to the market value of the land left in his tract? Can anyone say his demand would not be just?''

We will not discuss the question of the plaintiff's right to recovery because of his loss through the marring of the view from his residence. The trial court held that he might not recover for that and does not include that in the $5,000.00 for which we are contending.

In support of his ruling that the plaintiff might not recover damages to the residue of his land by reason of the uses, present and future, of the various adjoining tracts of land which defendant acquired by purchase or condemnation from persons other than plaintiff the trial court cited *Horton* v. *Colwyn Bay Council,* 1 L. R. K. B. (1908) 327. Both Lord Alverstone and Lord Justice Buckley pronounced opinions in that case. Both call attention to the fact that no land of the plaintiff was taken. Lord Alverstone said, however, that even though land had been taken he would reach the same conclusion. Lord Justice Buckley seems to

have attached more importance to this fact. At page 341, he says:

> "The legal proposition involved in the Tilbury case, I think, is that if an actionable wrong has been done to the claimant he is entitled to recover all the damages resulting from that wrong, and none the less because he would have had no right of action for some part of the damage if the wrong had not also created a damage which was actionable. The facts were that the claimant was entitled to lights which were, and to lights which were not, ancient. A building was erected so as to cause damage to both the ancient and the modern lights. He could have stopped that building by injunction because it interfered with his ancient lights. It was held that the damage he could recover was not confined to the injury to his ancient lights, but extended to the injury to all his lights, whether ancient or modern.
>
> The Tilbury case is concerned with the case where an actionable wrong has been done to the claimant. It decided that the claimant, entitled as he is to sue by reason of that wrong, may in that action recover all the damage he has sustained, including damage which he could not have recovered if this latter had been the only damage done him. The present case is of the former not the latter class. In the present case no land was compulsorily taken from the claimant."

But granting that the English rule supports the trial court's conclusion we submit it is not controlling for the reasons given by this Court in

Richards v. *Washington Terminal Co., supra.* At page 552, this Court say:

> "The courts of England, in a series of decisions, have dealt with the general subject now under consideration. (Citing numerous cases.) The rule to be deduced from these cases is that while no action will lie for an invasion of private rights necessarily resulting from the establishment and operation of railways and other public works under the express sanction of an act of Parliament, yet that such acts are to be strictly construed so as not to impair private rights unless the legislative purpose to do so appears by express words or necessary implication. In short, Parliament, being omnipotent, may authorize the taking of private property for public use without compensation to the owner; but the courts decline to place an unjust construction upon its acts, and will not interpret them as interfering with rights of private property unless the language be so clear as to admit of no other meaning.
>
> "But the legislation we are dealing with must be construed in the light of the provision of the 5th Amendment.—'Nor shall private property be taken for public use without just compensation'—and is not to be given an effect inconsistent with its letter or spirit."

The trial court next cited *Walker* v. *Old Colony R. R. Co.*, 103 Mass. 10. The decision in that case supports the trial court's ruling in the case at bar.

In *Lincoln* v. *Commonwealth*, 164 Mass. 368, at p. 376, while applying the same rule, the court says:

"This rule is narrower than that laid down in the Wisconsin and English cases, and if it is open to the objection that it is hard to apply and too refined for practical purposes, * * *."

In *Baker* v. *Boston Elevated Ry.*, 183 Mass. 178, the court again speaks of the difficulty of applying the rule.

The Supreme Court of Iowa had with slight modification followed the Massachusetts rule laid down in *Walker* v. *Old Colony Railroad Company*, 103 Mass. 10. (See *Kucheman* v. *Ry. Co.*, 46 Iowa 360.) As the early Iowa rule was considered in Section 750 of Lewis on Eminent Domain which was also cited by the trial court as supporting his ruling we will here quote that section.

Lewis on Eminent Domain, Third Edition:

"Section 750 (503c). *Whether the effect of the entire work or improvement is to be considered or merely that portion thereof which is on that part taken.* In Iowa it has been held that where a railroad was laid in a street in front of plaintiff's land, who owned the fee to the center of the street, he could only recover such proportion of the total damage to his property, by the railroad in the street, as the part of the track on his own land bore to the entire track. So in Minnesota it has been held that, in case of railroads in streets, the abutter's compensation must be confined to the damage occasioned by the construction and operation of that part of the road in front of his lot. But other courts have repudiated this position and have held that the railroad is to be regarded as one entire thing and the effect

of the whole structure considered. A strip was taken from the south side of plaintiff's land for part of railroad right-of-way, but the road was constructed almost wholly on land taken from an adjoining proprietor. It was contended that the plaintiff could recover damages solely for the injuries sustained by him because of the use of that part of the right-of-way taken from his own land, and that nothing could be recovered because of cuts and embankments made on land taken from others or because of the construction and operation of the road on such land. The court, however, held otherwise, and says: 'It may be conceded that if the railroad company had constructed its road just over the line entirely on the town site, without appropriating any of plaintiff's land for its right-of-way, the plaintiff could not recover anything therefor. This often appears to work great hardship. It sometimes happens that a railroad company builds its road in such manner as to greatly injure adjacent property, and it seems a great hardship for landowners to sustain such injuries, and be without remedy. That, however, is not the case under consideration. Here the company concedes the necessity of having a portion of plaintiff's land for its right-of-way. It seeks to condemn the right to use it for necessary purposes connected with the construction and operation of its road. Having obtained such right, it is not limited in the use of it to the one roadway already constructed, but it has the right, if it chooses, to construct sidings or other tracks on that portion of the right-of-way taken from plaintiff's land, or it may move its line over onto his land. The right to condemn the land

is based on a necessity existing, or at least supposed to exist, that the company should have it for use in connection with its road. We think the cuts, embankments, tracks, ditches, and right-of-way are to be considered as one entire thing in determining the plaintiff's damages. Usually the appropriation of a narrow strip along one of the boundary lines of a tract of land results in comparatively little damage to the land not taken, but it is not always so, and, where any portion of the plaintiff's land is condemned, we are unable to conceive any rule by which the plaintiff's damages could or should be measured at either more or less than the whole damage which he actually sustains by reason of the appropriation of his land, and the construction of the road.' ''

In *Haggard* v. *Independent School District of Algona,* 113 Iowa 486, the Supreme Court of that state on reconsideration rejects its early rule as being too difficult of application to be of any practical value. and adopts the rule laid down in *Blesch* v. *Railway Company,* 48 Wis. 168. We quote from the opinion of the Iowa court, page 493:

"We are prepared now to consider the most difficult question involved in this proceeding, which is the right of appellee to consequential injury to his entire premises due to the taking of a portion of such premises as a part of the site for a public school building. In rulings on evidence and instructions to the jury, the court below adopted the view that any inconvenience due to the taking of the property for school purposes, and naturally resulting from

such appropriation, by which the market value of the premises was unfavorably affected, should be considered in determining appellee's damages. In considering what damages should be allowed where property is taken for public use, there are three possible views: First, that the landowner is entitled only to the value of the land of which he is deprived, and the damage to the remainder of the tract due to that particular portion being separated from the balance, without any compensation to him for injury from a use of the portion taken for purposes which may cause him only the same kind of inconvenience which is suffered by other adjoining property owners whose land is not taken, and who, therefore, would not be entitled to any damages; Second, that the landowner is entitled to compensation not only for the taking of his land but for the use of it for public purposes even though the use is lawful, if it cause him injury; and third, that the landowner while not in general entitled, merely because a part of his land is taken, to compensation for inconvenience which he suffers in common with adjoining landowners whose land is not taken, is entitled to recover for depreciation in value of his entire tract arising from the proximity of the public improvement so far as it is due to proximity secured by means of taking a part of his land and which would not have resulted but for such taking. The last one of these is perhaps theoretically sound; but it does not give the landowner whose land is taken compensation for the general inconveniences resulting from the public improvement which affect in common all adjoining landowners, while it does give him damage resulting from

the taking of his property. *Lincoln* v. *Commonwealth,* 164 Mass. 368; *Rand* v. *City of Boston,* 164 Mass. 354; *Taft* v. *Commonwealth,* 158 Mass. 526. But this rule is too difficult of application to be of any practical value. Who cay say, in this case for instance, how much the inconvenience due to the proximity of the school building on the balance of this block would be increased by the fact that half the land in question was included in the schoolhouse site? Probably a compensation based on the first view would satisfy the constitutional requirement, but if the legislature has provided that a more liberal measure of compensation shall be adopted, one which gives to the man whose property is taken compensation for damages which he actually suffers, although one whose land is not taken must suffer the same injury without compensation, then the corporation which seeks to take the land must submit.

"Now the statutes with reference to taking private property for public use have been uniformly construed in this state as entitling the man whose land is taken to damages beyond a mere compensation for being deprived of his land. He is allowed, in case of condemnation for railway purposes, compensation for depreciation in value of the remainder of the tract, due to the proximity of a railroad from operation in the usual and proper manner and the inconvenience and annoyance resulting therefrom. *Kucheman* v. *Railway Co.,* 46 Iowa, 360 (other Iowa cases to same effect). The reason for such a rule is well presented in the case of *Blesch* v. *Railway Co.,* 48 Wis. 168 and 188 and see *Shano* v. *Bridge Co.,* 189 Pa. St. 245.

> 'We see no reason therefore why the inconvenience due to the proximity of a schoolhouse as affecting the market value of the residence property should not have been taken into account.' "

The trial court next cited in support of his ruling *Adams* v. *C. B. & N. R. R. Co.*, 39 Minn. 286; *Demueles* v. *St. P. & N. Ry. Co.*, 44 Minn. 436; *Keller* v. *Miller*, 63 Colo. 304. The injustice of the rules adopted by the Minnesota and Colorado cases may perhaps have been the moving causes in the amendments adopted by the people of those states adding the word "damaged" to the provisions of their constitutions requiring compensation for land taken.

The trial court also cited 20 C. J. 735. The discussion of the question begins at page 730. At page 734 it is said that "the improvement is to be considered as a unit in determining the damages resulting from its construction," and the cases of *Chicago, etc., R. Co.* v. *Van Cleave*, 52 Kan. 665, and *Blesch* v. *Chicago, etc., R. Co.*, 48 Wis. 168, are cited in support of the text. At page 735 it is said that "the damages should be limited to those accruing from the improvement upon the land condemned," and the case of *Keller* v. *Miller* (Colo.), 165 Pac. 774, is cited to support the text.

The trial court also cited 10 R. C. L. 154 in support of his ruling. The text relied on is as follows:

> "It has been held that when part of a parcel of land is taken for a use that is detrimental

to the remaining land, such as a railroad, the owner is not entitled to the full diminution of the market value of the land arising from the construction and operation of the railroad, but only to so much of it as is due to the fact that part of his land was taken."

From the notes appearing at the bottom of page 154 it is clear that the author's authority for said text was the case of *Walker* v. *Old Colony, etc., R. Co.*, 103 Mass. 10.

The leading case in which the rule for which plaintiff contends is adopted is *Blesch* v. *The Chicago & Northern R. R. Co.*, 43 Wis. 183. At page 195 of the opinion, the court says:

"In constructing its track upon the plaintiff's land without his consent, and without making compensation, the company was clearly a wrongdoer, and is liable for all the certain, direct and natural damages resulting to the plaintiff from its unlawful act. The damages recoverable in the action are, of course, for past injury to the freehold and possession; that is, the pecuniary loss which the trespass had caused the plaintiff in the use and enjoyment of his property when the suit was commenced. Laying out of view collateral questions, for the purposes of this case it seems to be sufficiently accurate to say, that the measure of damages would be the difference between the annual rental value of the premises with the railroad track where it was, and the road operated as it was, and what the rental value of the premises would have been had not the road been upon his land.

"The counsel for the company argued that

the plaintiff should recover such damages only as resulted from the six inch roadbed encroachment upon his premises, or such damages as the plaintiff sustained by reason of the operation of the road on that portion of the street lying west of the center line thereof, and in front of his premises. If by this it is meant that the plaintiff could recover only a fractional part of the damages, which the construction and operation of the road worked to his premises, a bare statement of the proposition is sufficient to show its unsoundness. A railroad is an entire thing, and it is impossible for any human intelligence to separate the loss or injury which its operation causes; apportioning so much to one portion, and so much to another. But we suppose the plaintiff was entitled to recover for all the loss which he had sustained by reason of the trespass of the company, and in consequence of the road being operated on his land, according to the rule above stated."

In the case of *Chicago, Kansas & Nebraska R. R. Co.* v. *Van Cleave*, 52 Kan. 665, the syllabus is as follows:

"Railroad Right-of-Way—Measure of Damages. In determining the damages of a landowner, a portion of whose land is appropriated for a right-of-way of a railroad, the railroad is to be regarded as one entire thing, and he is entitled to compensation for all damages directly resulting to the remainder of his land from the location and construction of the road, whether the roadbed be actually placed on that portion of the right-of-way taken from his land or not."

In the opinion in this case, at page 668, the court, after quoting with approval *Blesch* v. *Chicago & Northern R. R. Co., supra,* says:

> "The case of *Kucheman* v. *R. R. Co.,* 46 Iowa, 366, was cited and considered by the court, and the question here presented ably and thoroughly discussed. The conclusion reached was that, where a portion of the plaintiff's land is appropriated for its right-of-way by the company, he is entitled to recover for all injuries he sustained, flowing directly from such appropriation, and that the railroad is to be treated as one entire thing. It may be conceded that, if the railroad company had constructed its road just over the line entirely on the town site, without appropriating any of plaintiff's land for its right-of-way, the plaintiff could not recover anything therefor. This often appears to work great hardship. It sometimes happens that a railroad company builds its road in such a manner as to greatly injure adjacent property, and it seems a great hardship for landowners to sustain such injuries and be without remedy. That, however, is not the case under consideration. Here, the company concedes the necessity of having a portion of plaintiff's land for its right-of-way. It seeks to condemn the right to use it for necessary purposes connected with the construction and operation of its road. Having obtained such right, it is not limited in the use of it to the one roadway already constructed, but it has the right, if it chooses, to construct sidings or other tracks on that portion of the right-of-way taken from plaintiff's land, or, it may move its line over on to his land. The right to condemn the land is based

on a necessity existing, or at least supposed to exist, that the company should have it for use in connection with its road. We think the cuts, embankments, tracks, ditches and right-of-way are to be considered as one entire thing in determining the plaintiff's damages. Usually the appropriation of a narrow strip along one of the boundary lines of a tract of land results in comparatively little damage to the land not taken, but it is not always so; and where any portion of the plaintiff's land is condemned, we are unable to conceive any rule by which the plaintiff's damages could, or should, be measured at either more or less than the whole damage which he actually sustains by reason of the appropriation of his land and the construction of the road."

In *Frederick Shano* v. *Fifth Ave. & High Street Bridge Co.*, 189 Pa. St. 245, the syllabus is as follows:

"Where property is injured by the construction of public works, the measure of damage is the difference in the market value of the property before and after the construction. The creation of noise and dust, the invasion of privacy, the deprivation of light and means of access, the burden of additional fencing and like matters are to be taken into consideration as affecting the market value. They are not separately to be estimated item by item and a result reached by adding together the different estimates; nor is the effect upon the particular owner because of anything peculiar to himself or his business to be taken into consideration. The owner's loss is measured by the difference in the market value of his

property. This includes all the elements of depreciation and represents the whole loss; but the separate items are to be considered, not as distinct items of loss, but as they affect the market value.

"Noise, dust, invasion of privacy, obstruction of light and interference with means of access are matters affecting the value of property, and it is error for the court to charge that these matters are only circumstances to be considered by the jury in determining the credibility of witnesses who had testified to the market value before and after the construction of the public works."

The Government condemned a part of the land needed for the construction of the nitrates plant, for which plaintiff's land was taken, in the District Court of the United States for the Southern District of Ohio, Western Division, in case No. 2873 and entitled *The United States of America* v. *Lucy W. Broadwell et al.*, the trial judge in that case being the same as in the case at bar. In that case he charged the jury: "Compensation for the land will be the value, a fair market value of the land—so much and no more. Market value is the measure, the vessel, the bushel, as it were, by which the compensation for the land taken is to be measured." Further on he charged, "The market value is to be calculated in accordance with what it would sell for between a purchaser who was free to buy but under no compulsion, and a seller who was free to sell but under no compulsion." And again, "Market value is that sum which would be given and accepted if the land were sold by one

willing to sell, who did not have to sell, to one willing to buy but who did not have to buy." And further on, "Second, as to the residue of the tract: The 74.055 acres are taken from a tract of 195 acres, leaving what we know as the residue being approximately 121 acres. I shall speak of it as 121 acres, be it more or less. How much is the market value of the residue, 121 acres, lessened or diminished by reason of this appropriation of seventy-four and a fraction acres to the uses of the Government of the United States? Your answer to that question will be the sum which will be awarded to the defendants as damage to the residue." And further on, "You will see that if you have done your work correctly and followed the rules which I have given you the total of your verdict, that is, the total sum that you award to the defendants, added to the value of what the defendants will have left, should equal the value of the farm as a whole —neither more nor less. That is to say, that which the Government pays to the defendant, added to that which the defendants have left, the value of the 121 acres and improvements as they remained, should just equal the total value of the entire tract at the present date in its 1918 condition. So that the defendants will be neither richer nor poorer by reason of the fact that the United States of America has reclaimed this land as its own * * *". The instructions of the court in that case undoubtedly correctly stated the law.

Market value is determined by facts and conditions—not theories. A willing purchaser, in determining what will be a fair offer for the residue

of a tract of land, will consider all the facts, conditions and circumstances which may reasonably be expected to affect it and will not limit his consideration to that which is done or to be done on the part of the land taken by the condemnor from the seller.

CONCLUSION

The cases in which the exact point was decided are few. The Massachusetts rule, criticized as difficult of application by the Supreme Judicial Court of that state, was followed by Iowa, Colorado and Minnesota. Iowa, as has been pointed out, has repudiated it and Colorado and Minnesota have escaped it by changes in their constitutions. The Wisconsin rule laid down in *Blesch* v. *Railway, supra,* has been approved by the courts of Iowa and Kansas. We submit that the courts of the many states, including Ohio, in which it has been held that the owner, part of whose land is taken, is entitled to compensation for the diminution in the value of his remaining land measured by the difference in market value of such land before and after the taking are by logic in accord with the rule laid down in the Wisconsin case. If, as the Pennsylvania case puts it, "The owner's loss is measured by the difference in the market value of his property. This includes all the elements of depreciation and represents the whole loss" no witness or jury would understand this to mean anything less than the words imply unless the court

told them it meant only the elements of depreciation and loss arising from the use to be made of that part of the owner's land taken and did not include any element of depreciation and loss arising from the use to be made of the land taken from his neighbors. The fact that the decisions do not state the limitation raises the implication that it does not exist.

We submit that reason, justice and authority support our contention that the plaintiff is entitled to recover the $5,000.00 disallowed by the trial court.

Respectfully submitted,

A. JULIUS FREIBERG.

In the Supreme Court of the United States

OCTOBER TERM, 1924

JOHN V. CAMPBELL, PLAINTIFF IN ERROR,
v.
THE UNITED STATES OF AMERICA } No. 73

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, TRANSFERRED FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

STATEMENT

This writ of error was taken to review a judgment of the District Court for the Southern District of Ohio. Originally carried to the Circuit Court of Appeals for the Sixth Circuit, that court transferred it to this Court pursuant to Section 238(a) of the Judicial Code.

The action was brought to secure compensation for property belonging to the plaintiff in error and appropriated by the United States for purposes connected with the prosecution of the war. The judgment awarded compensation for the value of the property actually taken, and for damages to the residue of the

estate resulting from the appropriation of the part actually taken, but declined to award damages by reason of the injury to the residue of the estate resulting from the uses, present and future, of various other tracts of land which the United States had acquired from persons other than the plaintiff. The refusal of the court to award such damages is the sole assignment of error.

The District Court treated the case as a so-called "Tucker Act" case. We think the court was right, and no complaint is made upon that score by either party. For that reason direct review should be had in this Court and not in the Circuit Court of Appeals, and while the order of the Circuit Court of Appeals assigns no special reason (R. 29), we think it plain that such was the view of that Court in transferring the cause to this Court.

THE FACTS

The case arose in this way: Prior to August 31, 1918, the United States had acquired possession of some 1,300 acres of land in the Little Miami Valley near the City of Cincinnati, comprising many parcels of land which it had acquired by purchase or condemnation proceedings from different owners. (R. 17.)

On that day officers of the United States, acting under authority of the Secretary of War, entered and took possession of 1.81 acres of land belonging to the plaintiff lying in the valley at the foot of the hill upon which plaintiff's residence was situated. This

was done without the consent of the owner and without compensating him. The lot so taken was used as a garden, was in a high state of cultivation, and was part and parcel of plaintiff's entire estate, which comprised 69.73 acres (R. 17), though separated from the remainder of his lands by a country road (R. 11.)

The purpose of the United States in acquiring this large tract of land was the construction of a nitrate plant, pursuant to the authority found in the Act of June 3, 1916 (c. 134, Sec. 124, 39 Stat. 166, 215). This act authorized the President to acquire by lease, purchase, condemnation, gift, grant, or devise necessary lands for that purpose. This land of the plaintiff was not acquired by any of these methods, and the act itself made no provision for a suit for just compensation by any person whose property was taken in any other way. Inasmuch, however, as the property was taken by due authority for a lawful purpose, the District Court held that an implied contract arose to pay the owner just compensation which was enforceable in accordance with section 24 (20) of the Judicial Code.

The United States proceeded with the construction of the nitrate works, erecting buildings, constructing railroads, a sewerage system, and such other things as are incident to a large industrial development. The plaintiff's land and the other adjoining land were enclosed with a fence.

After the Armistice the Government determined to abandon the project and to dispose of the properties

acquired. Part of the lands were returned to their former owners, part was sold, and the remaining 320 acres, including the 1.81 acres which had belonged to the plaintiff, are still held, but the court finds that the Government is definitely determined to sell.

The court found that the defendant's seizure and use of the 1.81 acres amounted to a taking of the fee thereof; that the value of the said fee was $750; and that plaintiff was entitled to recover from the defendant that sum. (R. 18.) The parties were in substantial agreement as to that element of damage. (R. 12.)

The court further found that the damages to the residue of plaintiff's estate resulting from the appropriation of the said 1.81 acres by reason of their severance, by reason of their loss as the convenient garden spot of the estate, by reason of the uses to which they have been put, particularly during the period of construction, and by reason of the uses to which the said 1.81 acres may in the future be put was the sum of $2,250, and that plaintiff was entitled to recover from the defendant that amount.

The court found that the present use of the other lands was not injurious to the plaintiff's estate except by reason of the fact that the view, which is a considerable element of its value, is less beautiful than it would have been had the agricultural surroundings continued unchanged (R. 17, 18); that the marring of the prospect is due principally to the presence of certain buildings and foundations of others that have

been removed; that these structures are, however, at quite a distance from plaintiff's residence and are not an obstruction to the view but only objects in the picture less pleasant than those which were formerly there; that the buildings are used as Government warehouses and stand on property which plaintiff did not own and are now used for storage quite independently of the land taken from plaintiff (R. 18).

The finding of the court to which the sole assignment of error is directed is as follows (R. 18–19):

> The court further finds that the amount of plaintiff's damages by reason of injury to the residue of his estate, by reason of the uses, present and future, of the various different tracts of land which defendant acquired by purchase or condemnation from persons other than plaintiff for the now abandoned nitrates project, and chiefly by reason of the probability that said tract improved as it has been by defendant by roads, railroads, sewers, fences, water, and lighting facilities, is soon to be offered for sale, and will probably be bought and used for industrial purposes, and that this probability has even at the present time a very depressing effect upon the value of plaintiff's estate considered from the standpoint of its best use, that of a fine country residence, is the sum of $5,000, but the court finds that plaintiff is not entitled to recover said sum, and said sum is therefore disallowed.

Whether the facts set forth in this last finding constitute elements of recoverable damage is the question now presented to the Court.

ARGUMENT

The District Court Awarded just compensation for the property taken

We agree with the proposition on page 11 of the brief of plaintiff in error that the taking of plaintiff's 1.81 acres created an implied contract on the part of the United States to compensate plaintiff in the same manner as he would have been compensated through proper proceedings in condemnation.

The measure of compensation in such cases is too well settled to be open to further discussion.

When part of a tract of land is taken for public use, the owner is entitled to recover first the value of the part taken, and second, the damage to the remainder of the tract resulting from the appropriation of a part of it to the uses for which it is taken. This rule is too well established to need citation of authority. In *Lewis on Eminent Domain*, 3d ed., vol. 2, sec. 686, it is stated that "upon this point there is entire unanimity of opinion," citing many cases. For these elements of damage the court below gave judgment.

But it is claimed that in addition plaintiff was entitled to damages for the injury to the residue of his estate by reason of the uses, present and future, of the various different tracts of land which defendant acquired from persons other than the plaintiff for the now abandoned project, and *chiefly by reason of the probability that these tracts will be offered for sale and will probably be bought and used for indus-*

trial purposes, and that this probability has a very depressing effect upon the value of plaintiff's estate as a fine country residence. In other words, that the defendant must pay to the plaintiff the sum of $5,000 for the privilege of selling land of which it is the lawful owner to whomsoever it will and for any purpose to which the purchasers shall see fit to use it.

On page 7 of the brief of plaintiff in error it is stated:

> It seems that the exact question here presented has never been decided either by this court or the Supreme Court of the State of Ohio.

To this statement it might be added that it is quite probable that no such claim was ever before presented to any court under any system of jurisprudence similar to ours. The United States must pay for what it took from the plaintiff, either of tangible property or of property rights recognized by the law and for the protection of which the plaintiff had a remedy. Of course, we are not dealing with the question of nuisance nor are we called upon to construe restrictive covenants in deeds. The bald proposition is that the United States should pay $5,000 to the plaintiff in error because it owns 320 acres of land which it has developed for factory purposes and which it proposes to sell, and that the probable use to which the land will be put, though lawful, is such as to impair the value of his property for residential purposes. The plaintiff has no right and never did have a right to prevent the United States from selling this land. He

is not trying to protect his land; he is trying to take away from the United States some of its property rights—that is, the right to sell its own property—by imposing upon the United States a penalty of $5,000 because it contemplates the exercise of that right.

The finding of the court is that this depreciation results "by reason of the uses, present and future, of the various different tracts of land defendant acquired" from persons other than the plaintiff and "chiefly by reason of the probability that said tract * * * is soon to be offered for sale and will probably be bought and used for industrial purposes." Another finding is that the *present use of these lands is not injurious to the plaintiff's estate except by reason of the fact that the view is less beautiful than it would have been had the agricultural surroundings continued unchanged.*

We are unable to find any authority which holds that the owner of property is entitled to recover because the owner of adjacent property has done something which, though lawful, has made it less beautiful than it was before, and that he proposes to sell it for manufacturing rather than agricultural purposes. The brief of the plaintiff in error, however, discusses at length the abstract proposition whether, in estimating damages to the residue of an estate where part is taken for public use, there must be allowed only such damages as flow from the use made of the land which is taken, or whether there must be included damages resulting from what is done by the condemnor upon other lands. The

weight of authority clearly is that the only damages recoverable are those due to the taking of the plaintiff's land and do not include that which is done upon other land, subject to a possible modification if the two are so blended in one entirety that separation becomes impossible.

Walker v. *Old Colony R. R. Co.*, 103 Mass. 10.
Lincoln v. *The Commonwealth*, 164 Mass. 368.
Adams v. *C. B. & N. R. R. Co.*, 39 Minn. 286.
Demueles v. *St. Paul & No. Pac. Ry. Co.*, 44 Minn. 436.
Keller v. *Miller*, 63 Colo. 304.
2 Lew. on Eminent Domain, 3d ed., sec. 750.
Horton v. *Colwyn Bay, etc., District Council*, L. R. (1908) 1 K. B. 327.
Richards v. *Washington Terminal R. R. Co.*, 233 U. S. 546.
Hatch v. *C. & R. R. R. Co.*, 18 Ohio St. 92.

In the case of *Lincoln* v. *Commonwealth*, 164 Mass. 368, the court, by Mr. Justice Holmes, after discussing cases in England and Massachusetts and the rule which permits recovery for depreciation of value arising from the proximity of a railroad and running of trains, so far as it is due to proximity secured by means of taking a part of petitioner's land and would not have resulted but for such taking, said (p. 377):

> * * * The rule laid down gives the damages, but only the damages due to the taking of the petitioner's land. It is true

> that the works might not have been constructed at all if they had not been put where they were, but this consideration is met by the fact that, if they had been constructed just outside his land, the petitioner would have suffered no wrong under the Constitution, or at common law if no statute had been passed, and would have had no remedy under the statute. At all events, the Massachusetts rule has been in force too long now to be questioned. * * *

The case of *Horton* v. *Colwyn Bay, etc., Council*, L. R. (1908) 1 K. B. 327, involved the question of damages for the construction of a sewage system pursuant to the Public Health Act. The sewers were in part constructed on land the property of claimant. The pumping station and the reservoir were constructed on land the property of other persons. The claimant was allowed damages for sewers constructed on his property, but not for the pumping station or anything else done on land not his property. The inference drawn by counsel for the plaintiff in error, on page 42 of his brief, that no land of the claimant was taken is erroneous.

In his opinion Lord Chief Justice Alverstone says (p. 332):

> There is no question as to his being entitled to the sum of £871 10s. in respect of land taken for the construction of certain sewers.

The case was tried before Bigham, J., and on appeal to the Court of Appeal his judgment was sustained. In his opinion the Lord Chief Justice

points out that the local authority had obtained no special statutory powers to acquire land compulsorily. Their power was that contained in a series of sections of the Public Health Act and by one section of that act, to quote the language of the Lord Chief Justice, "full compensation is to be paid for any damage sustained by any person by reason of the exercise of the powers of the act. Therefore the case is not one in which the work in respect of which the claim for compensation arises has been constructed under special statutory powers." He goes on to say that he does not think it very material, but "that it should not be lost sight of, having regard to some of the views that have been expressed in earlier cases as to the right of a claimant whose land is taken to exercise a veto, as it is said, upon the construction of the works." After considering numerous English cases, he quotes from the judgment of Bigham, J., as follows (p. 339):

> I think it is clear that the exercise of the statutory powers referred to and contemplated by the learned judges in the *Tilbury Case* (1) consists of something done on the land taken from the claimant by the public body, or on land held by him. Such an exercise of the statutory powers alone concerns him. The statutory powers exercised elsewhere, though they may depreciate the value of his property, can not in my opinion be relied upon for the purpose of increasing the compensation recoverable.

And says that in his opinion "that is a perfectly accurate statement of the result of the authorities as they now stand."

Lord Justice Buckley, in his concurring opinion, says (p. 340), "but no case has been cited, and none, I think, exists in which the doctrine has been applied to damage occasioned by works erected upon land not taken from the claimant."

To be sure, as pointed out by this court in *Richards* v. *Washington Terminal R. R. Co.*, 233 U. S. 546, neither the English courts nor Parliament is bound by any constitutional provision like ours against taking private property for public use without just compensation. But even so, reported cases show not only the disposition of Parliament to provide by act full protection to owners of property taken, but a disposition on the part of the English courts to construe those provisions so as to give property owners adequate compensation. It is interesting to note that the result now reached by the English Courts is substantially in accord with the spirit of our Fifth Amendment. See 33 *Howard Law Review* 713, 714, commenting upon *Attorney General* v. *Keyser's Hotel* (1920) A. C. 508. Some of the Acts of Parliament would seem to be much broader than the Fifth Amendment. For instance, the Scotch Railroad Clauses Act of 1845 provides that the railroads should make the owners and occupiers and all other parties interested in any lands taken "or injuriously affected by the construction thereof, full compensation for the value of the land so taken and

for all damage sustained by such owners." In construing this section the House of Lords in *Caledonian Ry. Co.* v. *Walker's Trustee* (1882) 7 App. Cases, 529, held that in order to found a claim for compensation under that section some special or peculiar damage must be done to the lands by reason of the construction of the works which diminished the value of the lands, which damage would have been the subject of an action at law before the statute.

This principle was recognized by this court in *Richards* v. *Washington Terminal R. R. Co.*, 233 U. S. 546, which was an action for damages for a nuisance. While this Court held that the plaintiff, whose property was situated near the entrance to the tunnel in this city, though not abutting directly upon the tracks, was entitled to damages for injuries from great quantities of smoke and gas coming from the tunnel by a ventilating contrivance, nevertheless it held that he was not entitled to any damages for the ordinary and inevitable annoyance and damage incident to the operation of the railroad. The damage allowed in that case was regarded as special, peculiar, and perhaps unnecessary. If not preventable, then the plaintiff's property was to be regarded as "necessary for the purposes contemplated" by the statute, and so might be acquired by purchase or condemnation. If the damage was readily preventable, then the statute furnished no excuse. In other words, it was a private nuisance.

We have no such situation presented here.

The protection afforded by the Constitution is for those whose property is "taken," not "taken or damaged," as in some of the State constitutions. 233 U. S. 554.

Mr. Justice Pitney in the *Richards case* reviews at some length the English and American cases on this subject and concludes that in the case of railroads (p. 554)—

> Any diminution of the value of property not directly invaded nor peculiarly affected, but sharing in the common burden of incidental damages arising from the legalized nuisance, is held not to be a "taking" within the constitutional provision.

Though, as held by Judge Peck in the court below, this is not a case of local law (see *Kanakanui* v. *United States*, 244 Fed. 925) in which the decisions of the Ohio courts are controlling, nevertheless he shows clearly that there is nothing in the decisions of the Supreme Court of that State contrary to position taken by the Government (p. 14).

The case is not analogous to the *Elevated Railroad Cases* in New York City, where it was held that the construction, maintenance, and operation of an elevated railroad on a public street, even though by legislative and municipal authority, deprived the abutting owners of certain easements defined as easements of light, air, and access, which were in the nature of property protected by the Constitution. Indeed the case is quite different from the railroad cases in general, for the construction and operation

of a steam railroad anywhere in this country without legislative authority would probably be regarded as actionable nuisance for which neighboring property owners injuriously affected would be entitled to redress. Such is not the case when the owner of unrestricted land builds a factory on it, much less the case when he merely contemplates selling it to some one else who may build a factory on it.

But the abstract question whether a property owner, some of whose property is taken, is entitled to damages for the rest of his property based upon acts not done or contemplated upon property taken from him, but upon other property which he does not and never did own, while interesting, does not, we think, really arise in this case. The findings of the trial court show clearly that the depreciation which the plaintiff in error seeks to recover as damages is too remote and speculative to be considered. It does not amount to a "taking" of plaintiff's property, and this court has decided many times that recovery can not be had against the United States for anything short of a taking of property.

See *Smith* v. *Corporation of Washington*, 20 Howard, 135, alterations in the grade of streets; *Gibson* v. *United States*, 166 U. S. 269, damages resulting from improvement of a navigable river; *Meyer* v. *City of Richmond*, 172 U. S. 82, obstruction of a street by a railroad authorized by the city of Richmond; *Scranton* v. *Wheeler*, 179 U. S. 141, 153, 162, construction of a pier by the United States; *Bedford* v. *United States*, 192 U. S. 217, 224, 225, flooding of land as a result of

revetments erected by the Government along the banks of the Mississippi River; *Union Bridge* v. *United States*, 204 U. S. 364, 397, damages for the alteration of a bridge over a navigable river ordered by the Secretary of War; *Peabody* v. *United States*, 231 U. S. 530, 538, 539, the location of a battery within the vicinity of the owner's land and within the range of the fort; *Portsmouth Harbor Land Company* v. *United States*, 250 U. S. 1, damages resulting from gunfire; *Bothwell* v. *United States*, 254 U. S. 231, forced sale of cattle and destruction of business on account of the construction by the Government of a dam which flooded the owner's land.

CONCLUSION

The judgment should be affirmed.

JAMES M. BECK,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

OCTOBER, 1924.

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CAMPBELL *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, TRANSFERRED FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 73. Argued October 15, 1924.—Decided December 8, 1924.

1. In an action brought in the District Court under Jud. Code, § 24, (20) to recover compensation for property taken by the United States, judgment is reviewable directly by this Court and not by the Circuit Court of Appeals P. 369.

2. The just compensation assured by the Fifth Amendment to an owner, part of whose land is taken for public use, does not include compensation for diminution in value of the remainder caused by the acquisition and use of adjoining lands of others for the same undertaking. P. 370.

Affirmed.

ERROR to a judgment of the District Court awarding part only of the amount claimed by the plaintiff in error as compensation for land taken by the United States and damage to his remaining land. See 291 Fed. 1015.

Mr. John V. Campbell, with whom *Mr. A. Julius Freiberg* was on the brief, *pro se.*

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This action was brought by John V. Campbell to recover compensation for 1.81 acres of land taken by the United States to be part of a site for a plant for the production of nitrates. The district court found that the value of the land was $750, and that, by the taking, the remainder of his property was damaged $2,250. It also found that, by reason of the uses to be made of lands acquired from others for the same project, plaintiff's lands not taken were damaged $5,000. The court allowed the first two items and disallowed the last. The judgment was for $3,000 and interest. Plaintiff took the case to the Circuit Court of Appeals on writ of error, but it should have been brought to this court, (§ 24, par. 20, Judicial Code; *J. Homer Fritch, Inc.,* v. *United States,* 248 U. S. 458,) and it was transferred under § 238a, Judicial Code. Act of September 14, 1922, c. 305, 42 Stat. 837. The question for decision is whether plaintiff was entitled to

the damages to the remainder of his estate resulting from the use to be made of the lands acquired from others.

In 1918, the United States, to aid in the prosecution of the war, had determined to build a nitrate plant at Ancor in the Little Miami Valley, near Cincinnati, Ohio. In order to get a site, it had taken possession of many parcels of land making up a large tract, adjoining plaintiff's estate of 69.73 acres. August 31, 1918, an officer of the army, acting under the direction of the Secretary of War, and without obtaining plaintiff's consent or instituting condemnation proceedings or making any compensation therefor, took possession of a part of plaintiff's land, which was separated from the remainder by a public road. It was a garden, lying at the foot of a hill on which plaintiff's residence was situated. The entire tract, including the land taken from plaintiff, comprised 1,300 acres. The United States constructed on the site buildings, roads, railroads, a sewerage system, and such other things as are usually incidental to a large industrial plant. After the armistice, the project was abandoned. Some of the lands constituting the site were returned to the former owners, and some were sold. And the United States has determined to sell the rest of the land which includes that taken from plaintiff and amounts in all to 320 acres. The court found that the damages to the remainder of plaintiff's estate from the use to be made of lands acquired from others resulted chiefly from the probability that the tract, improved as it has been by the United States, will be sold and used for industrial purposes.

The taking was under the sovereign power of eminent domain. The President and Secretary of War were authorized to purchase or condemn the lands. Act of June 3, 1916, c. 134, § 124, 39 Stat. 215. Act of July 2, 1917, c. 35, 40 Stat. 241, as amended April 11, 1918, c. 51, 40 Stat. 518. And from the taking there arose an implied

promise by the United States to compensate plaintiff for his loss. *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 656; *United States* v. *Lynah*, 188 U. S. 445, 464; *United States* v. *Cress*, 243 U. S. 316, 329; *United States* v. *North American Co.*, 253 U. S. 330, 333. Thereupon he became entitled to have the just compensation safeguarded by the Fifth Amendment to the Constitution; that is, the value of the land taken and the damages inflicted by the taking—such a sum as would put him in as good a position pecuniarily as he would have been if his property had not been taken. *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 304. But he was not entitled to have more than that.

The land taken from the plaintiff was not shown to be indispensable to the construction of the nitrate plant or to the proposed use of the other lands acquired by the United States. The damages resulting to the remainder from the taking of a part were separable from those caused by the use to be made of the lands acquired from others. The proposed use of the lands taken from others did not constitute a taking of his property. *Richards* v. *Washington Terminal Co.*, 233 U. S. 546, 554. Plaintiff had no right to prevent the taking and use of the lands of others; and the exertion by the United States of the power of eminent domain did not deprive him of any right in respect of such lands. And, if the land taken from plaintiff had belonged to another, or if it had not been deemed part and parcel of his estate, he would not have been entitled to anything on account of the diminution in value of his estate. It is only because of the taking of a part of his land that he became entitled to any damages resulting to the rest. In the absence of a taking, the provision of the Fifth Amendment giving just compensation does not apply; and there is no statute applicable in this case that enlarges the constitutional right. If the former private owners had devoted their

lands to the identical uses for which they were acquired by the United States or to which they probably will be put, as found by the court, they would not have become liable for the resulting diminution in value of plaintiff's property. The liability of the United States is not greater than would be that of the private users. Plaintiff cites and relies upon *Belsch* v. *Chicago & Northwestern Ry. Co.*, 43 Wis. 183; *Chicago, K. & N. Ry. Co.* v. *Van Cleave*, 52 Kans. 665; and *Haggard* v. *Independent School District*, 113 Iowa, 486, to support his contention that he is entitled to have the damages found to have resulted to the remainder of his estate by the uses made and to be made of the lands acquired from others. In each of these cases, it was impossible separately to ascertain the damages caused to the remainder of the owner's tract by the taking and proposed use of a part of it. In this case, such damages were separately found, and plaintiff does not complain in respect of the amount of that element. We think that plaintiff's contention is not sustained. The rule supported by better reason and the weight of authority is that the just compensation assured by the Fifth Amendment to an owner, a part of whose land is taken for public use, does not include the diminution in value of the remainder caused by the acquisition and use of adjoining lands of others for the same undertaking. See *Walker* v. *Old Colony & Newport Ry. Co.*, 103 Mass. 10, 15; *Lincoln* v. *Commonwealth*, 164 Mass. 368, 377; *Adams* v. *Chicago, Burlington & Northern R. R. Co.*, 39 Minn. 286; *Keller* v. *Miller*, 63 Colo. 304, 307; *Horton* v. *Colwyn Bay & Colwyn Urban Council*, L. R. [1908] 1 K. B. 327.

Judgment affirmed.